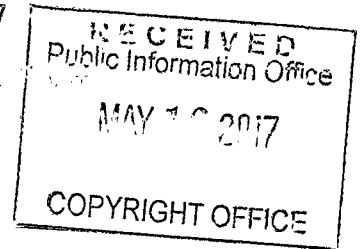


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MAY 17 2017

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
The Library of Congress  
Washington, D.C.



*In re*

**DETERMINATION OF RATES AND  
TERMS FOR MAKING AND  
DISTRIBUTING PHONORECORDS  
(Phonorecords III)**

**DOCKET NO. 16-CRB-0003-PR  
(2018-2022)**

**INDEX TO AMAZON DIGITAL SERVICES LLC'S  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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1.	Proposed Findings and Fact and Conclusions of Law of Amazon Digital Services LLC
2.	Declaration and Certification of Michael S. Elkin Regarding Restricted Materials
3.	Redaction Log to Amazon Digital Services LLC's Proposed Findings of Fact and Conclusions of Law
4.	Amazon Digital Services LLC's Proposed Rates and Terms
5.	Certificate of Service

# ATTACHED NOTES

ORIGINAL

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PUBLIC VERSION

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PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW  
OF AMAZON DIGITAL SERVICES LLC

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### INTRODUCTION

As Amazon Digital Services LLC (“Amazon”) has contended from the outset of this proceeding, the adoption of rates and terms that largely preserve the existing regulations—with a handful of minor clarifications and improvements—will further the objectives set forth in Section 801(b)(1) and work to foster a healthy and prosperous interactive streaming industry. The National Music Publishers Association and the Nashville Songwriters Association International (collectively, the “Copyright Owners”), on the other hand, propose changes that would upend the existing rates and terms in favor of an inflated one-size-fits-all rate featuring a per-play calculation. But as Amazon has explained, implementing a per-play mechanism would be unduly disruptive, and moving to a one-size-fits-all rate magnitudes higher than the status quo would be downright destructive. As detailed below and in the Joint Services’ Findings of Fact and Conclusions of Law, the participants’ written submissions and the evidence adduced at the hearing bear this out.<sup>1</sup>

The record evidence makes clear that the existing rates and terms have had an undeniably positive effect on interactive streaming and on the music industry more broadly. It is virtually undisputed that both digital piracy and the unbundling of the album in digital download stores had a badly damaging effect on music publishers and songwriters. In recent years, however, the music publishing industry has experienced a revitalization on the back of interactive streaming, and rightsholders are once again fairing quite well financially.

This reversal of fortunes is due in large part to the existing regulatory structure. As the trial evidence demonstrates, the current rates and terms accommodate a diversity of service

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<sup>1</sup> Amazon presents this Proposed Findings of Fact and Conclusions of Law in addition to the joint submission filed on behalf of Amazon, Google, Pandora and Spotify. This submission is offered to address facts and conclusions that pertain specifically to Amazon’s proposal.



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offerings that appeal to a broad base of potential customers, expanding the volume of legal music consumption and maximizing the availability of creative works to the public. Amazon is exemplary in this regard, having relied on the existing rates and terms as a guide to develop a suite of services that can and do serve a broad spectrum of music fans and that have demonstrably worked to expand the customer base for music streaming.

The existing rates and terms also ensure fair returns to all interested parties. As the trial evidence shows, the revenue-based portion of the current structure provides opportunities for upside sharing and facilitates important risk-sharing between service providers and rightsholders. At the same time, multiple alternatives to revenue ensure that fair compensation is paid in any scenario, including when revenues are low or impractical to calculate. Today's regulatory structure also already reflects the relative roles of the various stakeholders, and while service providers' contributions (and costs) have expanded in the streaming era, preserving the heart of the existing rates and terms is the surest way to minimize disruption in the industry.

Conversely, the record evidence also makes clear that the Copyright Owners' rate proposal would have a disruptive and damaging effect on both interactive streaming and the music industry. As an initial matter, the Copyright Owners' proposal features a per-play rate, which would shift too much risk to service providers and create unhealthy incentives to limit customer engagement in order to keep royalty expenses down. The Copyright Owners' proposed rates are also one-size-fits-all, which would restrict service providers' ability to offer differentiated services that help to expand the customer base for streaming. Most critical of all, the Copyright Owners' proposed rates are simply far too high and, as a result, would cause a number of existing streaming services to exit the market.

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As the evidence makes clear, fewer services—and in particular, reduced diversity in service offerings—will shrink the market for interactive streaming, ultimately restricting the availability of creative works to the public. In addition, royalty rates are already very high, and for any services able to survive, massive rate hikes will result in even more meager returns for service providers and—at a high level—a distorted distribution of wealth that fails to reflect the stakeholders’ relative roles and contributions. Together, these effects will disrupt the structure of the streaming industry and threaten to derail the important and recuperative trends that have been fueling the current resurgence in the broader music industry.

For all of these reasons, and as set forth more completely below in Amazon’s Proposed Findings of Fact and Conclusions of Law, the Copyright Royalty Judges (the “Judges”) should adopt Amazon’s proposed rates and terms for the 2018-2022 period.

\*\*\*\*\*

### FINDINGS OF FACT

#### I. AMAZON’S MUSIC BUSINESS

##### A. Overview of Amazon’s Music Business

AM-F-1. Amazon.com, Inc. opened for business in July 1995 as “Earth’s Biggest Bookstore.” Trial Ex. 1 (Mirchandani-WDT ¶ 8); 3/15/17 Tr. at 1306:18-19 (Mirchandani). Amazon recognized that the sale of books (and later, other products) over the Internet could offer attractive and previously unrealized benefits to customers, including more competitive pricing, enhanced selection, convenience, depth of content, and personalization. Trial Ex. 1 (Mirchandani-WDT ¶ 8); 3/15/17 Tr. at 1306:19-24 (Mirchandani). In time, Amazon expanded into other categories including music, video, and consumer electronics. Trial Ex. 1 (Mirchandani-WDT ¶ 8); 3/15/17 Tr. at 1306:25-1307:2 (Mirchandani).

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**AM-F-2.** Music was Amazon's second product category. Trial Ex. 1 (Mirchandani-WDT ¶ 9); 3/15/17 Tr. at 1307:12-18. Just as with all of its businesses, Amazon's music business and offerings are driven by Amazon's core principles: customer obsession, innovation, long-term thinking, and operational excellence. Trial Ex. 1 (Mirchandani-WDT ¶ 8); 3/15/17 Tr. at 1307:6-9 (Mirchandani).

**AM-F-3.** Amazon has invested substantial time and money to build a robust digital-music business featuring a diverse array of offerings designed to facilitate the distribution of music to as many customers as possible. Trial Ex. 1 (Mirchandani-WDT ¶ 9); 3/16/17 Tr. at 1393:25-1397:22 (Mirchandani). Today, Amazon's U.S.-based music business includes a physical music store, a digital download store, a purchased content locker service, a paid locker service, Prime Music (an interactive streaming service offered with Amazon Prime), Amazon Music Unlimited (a full-catalog subscription music service), and Amazon Music Unlimited for Echo (a full-catalog subscription music service available through a single, Wi-Fi enabled Amazon Echo device). Trial Ex. 1 (Mirchandani-WDT ¶ 10); 3/15/17 Tr. at 1307:22-1308:3 (Mirchandani).

**AM-F-4.** Amazon also offers a number of voice-controlled devices (Amazon Echo, Echo Dot, and Amazon Tap) that have transformed the way users interact with music services. Trial Ex. 1 (Mirchandani-WDT at ¶ 11); 3/15/17 Tr. at 1318:8-1319:14 (Mirchandani). These devices are powered by Alexa, Amazon's voice service, which is an open platform that supports both Amazon and third-party music services. Trial Ex. 1 (Mirchandani-WDT ¶ 11); 3/15/17 Tr. at 1318:14-20 (Mirchandani).

### 1. Amazon's Music Store

**AM-F-5.** Amazon launched its music store in June 1998 with a CD selection of more than 125,000 titles—10 times the number offered by the average music store at the time. Trial

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Ex. 1 (Mirchandani-WDT ¶ 12); 3/15/17 Tr. at 1307:12-13 (Mirchandani). Amazon later added vinyl and cassettes. Trial Ex. 1 (Mirchandani-WDT ¶ 9). Amazon has continued to expand this selection, and today offers more than one million titles in a variety of physical formats. Trial Ex. 1 (Mirchandani-WDT ¶ 12); Trial Ex. 22 (Hubbard-WDT ¶ 3.1).

### 2. Amazon's Digital Download Store

**AM-F-6.** As customers' music consumption habits began to change, Amazon remained committed to evolving its music offerings to meet customers' needs. Trial Ex. 1 (Mirchandani-WDT ¶ 9); 3/15/17 Tr. at 1307:10-18 (Mirchandani). Amazon launched its digital download store (Amazon MP3) in September 2007 with a catalog of more than two million tracks, the largest selection of *a la carte* DRM-free MP3s available at the time. Trial Ex. 1 (Mirchandani-WDT ¶ 13). Today, Amazon MP3 offers customers access to tens of millions of tracks. Trial Ex. 1 (Mirchandani-WDT ¶ 13). Amazon's download store offers consumers the ability to listen to free 30-second previews of songs in the catalog. Trial Ex. 1 (Mirchandani-WDT ¶ 15). Amazon has integrated its physical media and digital downloads stores, so that a customer searching for an album will be conveniently presented with all of the different formats in which it is available. Trial Ex. 1 (Mirchandani-WDT ¶ 14); Trial Ex. 22 (Hubbard-WDT ¶ 3.2).

### 3. Amazon's Locker Services

**AM-F-7.** In July 2012, Amazon launched a scan-and-match music locker service, providing customers a fast and easy way to import their existing music collections into their Amazon libraries. Trial Ex. 1 (Mirchandani-WDT ¶ 16). Amazon's purchased content locker service stores all of a customer's music files purchased from Amazon free of charge. Trial Ex. 1 (Mirchandani-WDT ¶ 16); 3/15/17 Tr. at 1310:16-22 (Mirchandani); Trial Ex. 22 (Hubbard-WDT ¶ 3.2). If customers want to import a significant number of non-Amazon music files,

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Amazon's paid locker service enables them to import up to 250,000 tracks for a fee of \$24.99 per year. Trial Ex. 1 (Mirchandani-WDT ¶ 16); 3/15/17 Tr. at 1310:23-25 (Mirchandani); Trial Ex. 22 (Hubbard-WDT ¶ 3.2). In January 2013, Amazon enhanced its locker services with the launch of AutoRip—an innovative service that gives customers an MP3 version of any physical music that they purchase from Amazon (including purchases going back all the way to 1998). Trial Ex. 1 (Mirchandani-WDT ¶ 17); 3/15/17 Tr. at 1311:1-16 (Mirchandani). More than 50,000 albums were available for AutoRip at launch. Trial Ex. 1 (Mirchandani-WDT ¶ 17). Today, more than 250,000 vinyl, cassettes, and CD titles are AutoRip eligible. Trial Ex. 1 (Mirchandani-WDT ¶ 17).

### 4. Prime Music

**AM-F-8.** In June 2014, Amazon further extended its digital music offerings with the launch of its first interactive streaming offering, Prime Music. Trial Ex. 1 (Mirchandani-WDT ¶ 18); 3/15/17 Tr. at 1311:17-21 (Mirchandani). Prime Music is an ad-free, bundled subscription service offering on-demand interactive music streaming and limited downloads for offline playback. Trial Ex. 1 (Mirchandani-WDT ¶ 18); 3/15/17 Tr. at 1311:24-1312:4 (Mirchandani). Prime Music offers a limited catalog of music; it launched with a catalog of more than one million songs and hundreds of playlists. Trial Ex. 1 (Mirchandani-WDT ¶ 18); 3/15/17 Tr. at 1312:5-6 (Mirchandani). In selecting content, new releases—those released within the past six months—are generally not included in Prime Music (with some limited exceptions). 3/15/17 Tr. at 1313:20-1314:1 (Mirchandani). Amazon later added algorithmically personalized stations to Prime Music. Trial Ex. 1 (Mirchandani-WDT ¶ 18); 3/15/17 Tr. at 1314:7-16 (Mirchandani).

**AM-F-9.** Today, Prime Music has a catalog of more than two million songs and offers customers thousands of different playlists and stations. Trial Ex. 1 (Mirchandani-WDT ¶ 18, 19); 3/15/17 Tr. at 1312:7-8 (Mirchandani). Prime Music users can search for content by artist

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or song name, and users can see the most popular songs and playlists streaming on Prime Music at any given time. Trial Ex. 1 (Mirchandani-WDT ¶ 19). Amazon has also invested in programmed content within Prime Music. Trial Ex. 1 (Mirchandani-WDT ¶ 20); 3/15/17 Tr. at 1314:11-16 (Mirchandani). Amazon curates more than 2,000 playlists in Prime Music based on genre, mood, and activity, such as '90s One Hit Wonders, Happy and Upbeat, and Classical for Reading. Trial Ex. 1 (Mirchandani-WDT ¶ 20).

**AM-F-10.** In developing Prime Music, Amazon learned that many people want access to great music, but most are unwilling to pay \$10 per month or \$120 per year to get it. Trial Ex. 1 (Mirchandani-WDT ¶ 21); 3/15/17 Tr. at 1336:8-13 (Mirchandani). In addition, Amazon learned that with free services, there are many things that can interfere with listening to music, like too many ads, limited playback options, and the fact that many free services are not available on a customer's mobile phone. Trial Ex. 1 (Mirchandani-WDT ¶ 21); 3/15/17 Tr. at 1336:19-1337:3 (Mirchandani).

**AM-F-11.** Amazon built Prime Music for more casual or passive music listeners who enjoy music but do not need or want access to a full catalog. Trial Ex. 1 (Mirchandani-WDT ¶ 22); 3/15/17 Tr. at 1314:11-16 (Mirchandani). Prime Music is a limited-catalog offering, bundled with Amazon Prime, that allows customers to access interactive streams and limited downloads for off-line playback. Trial Ex. 1 (Mirchandani-WDT ¶ 18); 3/15/17 Tr. at 1311:24-1312:4 (Mirchandani). The service's focus on offering catalogue content with fewer new releases, and its emphasis on offering station functionality, means that it targets "lean-back," passive customers. Trial Ex. 1 (Mirchandani-WDT ¶ 22); 3/15/17 Tr. at 1313:19-1315:14 (Mirchandani). This broad group comprises the more than [REDACTED] of Amazon's digital music customers who [REDACTED] on digital music with Amazon. Trial Ex. 1

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(Mirchandani-WDT ¶ 22); Trial Ex. 15 (Brost-WDT ¶ 5); Trial Ex. 16 (Amazon's Digital Download Revenue by Customer Segment). It also includes the [REDACTED] of consumers who [REDACTED]

[REDACTED] Trial Ex. 1

(Mirchandani-WDT ¶ 22); 3/15/17 Tr. at 1337:4-20 (Mirchandani); Trial Ex. 32 (Hubbard-WDT ¶ 2.12); 3/21/17 Tr. at 2180:16-22, 2182:19-2183:2 (Hubbard).

**AM-F-12.** In order to serve these customers, Amazon chose to offer Prime Music to existing Amazon Prime members at no additional cost. Trial Ex. 1 (Mirchandani-WDT ¶ 23); 3/15/17 Tr. at 1341:1-10 (Mirchandani); Trial Ex. 22 (Hubbard-WDT ¶ 3.3). This enabled Amazon to promote Prime Music to existing Prime members, many of whom were originally drawn to Prime by other valuable benefits, like free two-day shipping or original video content. Trial Ex. 1 (Mirchandani-WDT ¶ 23); 3/16/17 Tr. at 1629:7-20 (Mirchandani). By doing so, Amazon greatly reduced the friction for those customers who were unwilling to subscribe to a standalone streaming service or unfamiliar with streaming music altogether. Trial Ex. 1 (Mirchandani-WDT ¶ 23); 3/15/17 Tr. at 1341:6-10 (Mirchandani).

### 5. Amazon Music Unlimited

**AM-F-13.** In October 2016, Amazon launched Amazon Music Unlimited. Trial Ex. 1 (Mirchandani-WDT ¶ 24); 3/15/17 Tr. at 1316:18-22 (Mirchandani). Amazon Music Unlimited is a full-catalog subscription service offering on-demand interactive streaming and limited downloads for offline playback. Trial Ex. 1 (Mirchandani-WDT ¶ 24); 3/15/17 Tr. at 1317:4-17 (Mirchandani). Like Prime Music, Amazon Music Unlimited offers customers thousands of curated playlists and personalized stations. Trial Ex. 1 (Mirchandani-WDT ¶ 24); 3/15/17 Tr. at 1317:12-17 (Mirchandani). Amazon Music Unlimited has a catalog of tens of millions of songs and includes new releases, which differentiates it from Prime Music. Trial Ex. 1 (Mirchandani-WDT ¶ 24); 3/15/17 Tr. at 1317:13-16 (Mirchandani).

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**AM-F-14.** An individual Amazon Music Unlimited subscription is priced at \$9.99 per month. Trial Ex. 1 (Mirchandani-WDT ¶ 25); 3/16/17 Tr. at 1420:20-22 (Mirchandani). This is the same price as many other full-catalog subscription service offerings, including Spotify Premium, Apple Music, and Google Play All Access. Trial Ex. 1 (Mirchandani-WDT ¶ 25); 3/16/17 Tr. at 1420:7-22 (Mirchandani); Trial Ex. 977 (Phillips-WDT ¶ 25); 3/9/17 Tr. at 394:16-25 (Phillips); Trial Ex. 1060 (McCarthy-WDT ¶ 9); Trial Ex. 692 (Levine-WDT ¶ 48); 3/8/2017 Tr. at 225:12-15 (Levine); Trial Ex. 1611 (Dorn-WDT ¶ 19); 3/22/17 Tr. at 2456:21-25 (Dorn). Amazon Music Unlimited also has a discounted Amazon Prime member rate of \$7.99 per month, or \$79.00 per year. Trial Ex. 1 (Mirchandani-WDT ¶ 25); 3/16/17 Tr. at 1532:20-24, 1630;13-18 (Mirchandani). Amazon also offers a separate Echo plan for \$3.99 per month that is available on a single Amazon Echo, Echo Dot, or Amazon Tap. Trial Ex. 1 (Mirchandani-WDT ¶ 25) 3/16/17 Tr. at 1420:17-19 (Mirchandani).

**AM-F-15.** Amazon's strategy in launching Unlimited was to serve music aficionados and more engaged music customers whose needs are not being met by Prime Music's limited catalog. Trial Ex. 1 (Mirchandani-WDT ¶ 26); 3/15/17 Tr. at 1317:7-11 (Mirchandani). While these customers likely have a higher willingness to pay for a streaming service, they also represent a small portion of all consumers: [REDACTED]

[REDACTED] Trial Ex. 1 (Mirchandani-WDT ¶ 26); 3/15/17 Tr. at 1342:2-8 (Mirchandani); Trial Ex. 15 (Brost-WDT ¶ 5); Trial Ex. 16 (Amazon's Digital Download Revenue by Customer Segment).

**AM-F-16.** Amazon has also made significant investments in voice capabilities, including investments in machine learning and in new types of metadata that enable natural language voice controls. Trial Ex. 1 (Mirchandani-WDT ¶ 27). These investments allow



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customers to request music even when they do not know the exact name of the song. Trial Ex. 1 (Mirchandani-WDT ¶ 27); 3/15/17 Tr. at 1318:18-1319:14 (Mirchandani). For example, a customer can say “play the new song by Green Day” or “play the song that goes ‘I got my first real six string.’” Trial Ex. 1 (Mirchandani-WDT ¶ 27). Customers can also make requests like “play happy reggae music” or “play the top rock songs from 1982.” Trial Ex. 1 (Mirchandani-WDT ¶ 27); 3/16/17 Tr. at 1410:23-1411:2 (Mirchandani). Amazon believes these capabilities increase the audience for streaming services by making it much simpler and more intuitive for customers to interact with the service. Trial Ex. 1 (Mirchandani-WDT ¶ 27); 3/15/17 Tr. at 1319:8-14 (Mirchandani).

**AM-F-17.** While such voice capabilities benefit all of Amazon’s music services, Amazon launched Unlimited for Echo specifically to leverage them and serve more casual and passive music consumers who might not value the portability of the standard Unlimited tier, might not have previously considered subscribing to a standalone service, and likely have lower willingness to pay. Trial Ex. 1 (Mirchandani-WDT ¶ 28); 3/15/17 Tr. at 1317:18-23 (Mirchandani). According to studies consulted by Amazon, [REDACTED] [REDACTED] Trial Ex. 1 (Mirchandani-WDT ¶ 28).

### **6. Alexa-Enabled Devices: Echo, Echo Dot, and Tap**

**AM-F-18.** Alexa is a cloud-based service that powers Amazon’s proprietary speakers, including the Echo, the Echo Dot, and the Tap. Trial Ex. 1 (Mirchandani-WDT ¶ 30); 3/15/17 Tr. at 1318:14-17 (Mirchandani). Third parties can also use Alexa to add voice-enabled experiences to connected products (e.g., the Triby). Trial Ex. 1 (Mirchandani-WDT ¶ 30); 3/15/17 Tr. at 1319:4-7 (Mirchandani). Alexa is capable of voice interaction and music playback, can keep track of shopping and to-do lists, and can report the daily news, weather

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forecasts, traffic patterns, and sports scores and schedules. Trial Ex. 1 (Mirchandani-WDT ¶ 31); 3/15/17 Tr. at 1318:8-1319:7 (Mirchandani). It can also define words, identify state capitals, and recite information from many webpages, like Wikipedia. Trial Ex. 1 (Mirchandani-WDT ¶ 31). Alexa is compatible with an increasing array of smart-home technology, like switches, power outlets, and thermostats. Trial Ex. 1 (Mirchandani-WDT ¶ 31). With Alexa, Amazon is encouraging and enabling more people to listen to more music every day. Trial Ex. 1 (Mirchandani-WDT ¶ 32); 3/15/17 Tr. at 1319:12-14 (Mirchandani).

### **B. Amazon's Position in the Streaming Music Ecosystem**

**AM-F-19.** Under the current rates and terms, Amazon was able to develop services that target different segments of music customers. Trial Ex. 1 (Mirchandani-WDT ¶ 45); 3/15/17 Tr. at 1335:14-22 (Mirchandani). Because Prime Music comes bundled with Prime—a service that offers free two-day shipping, a video streaming service for television shows and movies, unlimited photo storage, free or flat rate grocery and household item delivery through Prime Pantry, access to Amazon's brand of basic household necessities through Amazon Essentials, access to Amazon's Dash service, and a library of free eBooks and audiobook channels, as well as other benefits—consumers who may not be willing to pay for a dedicated streaming music service (or who would not be willing to tolerate advertisements on a separate ad-supported platform) can obtain access to a legal music streaming service through their Prime membership fee. Trial Ex. 22 (Hubbard-WDT ¶ 2.18); Trial Ex. 1 (Mirchandani-WDT ¶ 23); 3/15/17 Tr. at 1336:8-1337:20 (Mirchandani); Trial Ex. 1572 (Article re Amazon's Prime Bundle). In this way, Prime Music can potentially reach the [REDACTED]

[REDACTED] Trial Ex. 1 (Mirchandani-WDT ¶ 35); Trial Ex. 22 (Hubbard-WDT ¶ 3.6); 3/21/17 Tr. at 2180:16-22 (Hubbard).

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**AM-F-20.** Amazon offers its standard Unlimited tier to serve its most engaged music customers—those who value having access to a full catalog on a broad range of devices. Trial Ex. 1 (Mirchandani-WDT ¶ 35); 3/15/17 Tr. at 1317:7-11 (Mirchandani). This segment includes the less than [REDACTED] [REDACTED] Trial Ex. 1 (Mirchandani-WDT ¶ 35); Trial Ex. 15 (Brost-WDT ¶ 5), Trial Ex. 16 (Amazon's Digital Download Revenue by Customer Segment).

**AM-F-21.** Finally, Amazon offers Unlimited for Echo, which features a full catalog for only \$3.99 per month, providing an entry point into the standalone streaming segment for the [REDACTED] and for those who do not need the portability that comes with the standard tier. Trial Ex. 1 (Mirchandani-WDT ¶ 35); 3/15/17 Tr. at 1317:18-23 (Mirchandani). Unlimited for Echo serves consumers who may place a lower value on full functionality. Trial Ex. 22 (Hubbard-WDT ¶ 2.20); 3/15/17 Tr. at 1317:18-23 (Mirchandani); Trial Ex. 1 (Mirchandani-WDT ¶ 35). The current rates and terms enabled Amazon to leverage unique distribution channels to build diverse streaming services as part of its digital music business. Trial Ex. 1 (Mirchandani-WDT ¶¶ 33-34); 3/16/17 Tr. at 1588:24-1589:5 (Mirchandani); Trial Ex. 32 (Hubbard-WDT ¶ 1.6(c)); 3/21/17 Tr. at 2182:4-24 (Hubbard).

### **C. Amazon's Diverse Music Business Was Built Around the Existing Rates and Terms**

**AM-F-22.** Amazon deliberately conceived of and designed its digital music business—including its Prime Music and Unlimited services—to fit within the specific service categories and rate structures in the existing regulatory scheme. Trial Ex. 1 (Mirchandani-WDT ¶ 71); 3/15/17 Tr. at 1315:21-1316:13, 1317:24-1318:7 (Mirchandani). As Amazon has evolved from retailer to streaming service provider, it relied on the existing regulatory scheme as a guide in developing a tiered offering designed to appeal to the full range of customer segments. Trial

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Ex. 1 (Mirchandani-WDT ¶ 35); 3/15/17 Tr. at 1335:12-1336:3 (Mirchandani). Amazon participated in the *Phonorecords II* proceeding through DiMA as it was preparing to launch its locker services, and Amazon pushed to include the “physical phonorecords” definition for a purchased content locker. 3/15/17 Tr. at 1308:8-21 (Mirchandani). In light of its efforts, Amazon designed its locker services to fit within the regulations and was ultimately able to launch its innovative AutoRip product. 3/15/17 Tr. at 1311:1-16 (Mirchandani).

**AM-F-23.** Nearly two years later, in 2014, Amazon considered and relied on the bundled subscription service definition when it determined to build and launch its Prime Music service. Trial Ex. 1 (Mirchandani-WDT ¶ 71); 3/15/17 Tr. at 1315:21-24 (Mirchandani); 37 C.F.R. §§ 385.11-13. The very language reflected in Sections 385.11, 385.12, and 385.13(a)(4) allowed Amazon to bundle Prime Music with Amazon Prime, enabling Amazon to bring a limited catalog of music to fans [REDACTED]

[REDACTED] Trial Ex. 1 (Mirchandani-WDT ¶ 71); 3/15/17 Tr. at 1315:21-1316:13 (Mirchandani). The compulsory license was particularly important for Prime Music because Amazon wanted to offer full albums without gaps where it otherwise could not negotiate publishing licenses for other tracks on the album. 3/15/17 Tr. at 1315:24-1316:13 (Mirchandani). From a consumer perspective, the more content gaps that a service has, the worse the product offering is. 3/8/17 Tr. at 208:4-5 (Levine).

**AM-F-24.** Most recently, in 2016, Amazon considered and relied on the standalone portable subscription service and standalone non-portable subscription service – streaming only definitions when it determined to build and launch both of its Unlimited services. Trial Ex. 1 (Mirchandani-WDT ¶ 72); 3/15/17 Tr. at 1317:24-1318:7 (Mirchandani); 37 C.F.R. §§ 385.11-13. The language reflected in Sections 385.11, 385.12, 385.13(a)(1), and 385.13(a)(3) allowed

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Amazon to implement both a portable full-catalog service that retails at \$9.99 per month *and* a separate service that, when accessed via the Amazon Echo, offers a full-catalog of tracks for only \$3.99 per month—less than half the price of most other full-catalog service offerings. Trial Ex. 1 (Mirchandani-WDT ¶ 72); 3/15/17 Tr. at 1317:24-1318:7 (Mirchandani). Flexibility within the *Phonorecords II* structure enabled the growth and diversity of Amazon's digital music business. Trial Ex. 22 (Hubbard-WDT ¶ 4.1); 3/21/17 Tr. at 2183:4-24 (Hubbard).

### II. AMAZON'S PROPOSAL

#### A. Amazon's Proposal Seeks to Largely Maintain the Existing Rates and Terms

**AM-F-25.** As Dr. Hubbard testified, the *Phonorecords II* framework offers a compelling benchmark to the degree that it provides for distinct product categories in terms of music service offerings and pricing possibilities and has fostered a diverse array of digital music offerings. Trial Ex. 22 (Hubbard-WDT ¶ 1.6(c)); 3/21/17 Tr. at 2176:9-16 (Hubbard). It is clear that the flexibility of the current structure facilitates varied services that can address differences in consumer tastes, preferences, and willingness to pay. Trial Ex. 22 (Hubbard-WDT ¶¶ 4.5-4.7); 4/13/17 Tr. at 5897:22-25 (Hubbard). Indeed, the current rate structure enabled Amazon to develop a varied assortment of services designed to appeal to all strata of customers and which has resulted in increased royalty payments to rightsholders. Trial Ex. 1 (Mirchandani-WDT ¶ 37); 3/15/17 Tr. at 1437:13-16 (Mirchandani); Trial Ex. 22 (Hubbard-WDT ¶ 3.7); 4/13/17 Tr. at 5910:7-19 (Hubbard). As such, Amazon seeks to maintain the current rates and terms with four minor modifications. Trial Ex. 1 (Mirchandani-WDT ¶ 31); 3/15/17 Tr. at 1320:20-22 (Mirchandani).

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### B. Amazon's Proposed Clarifications and Improvements<sup>2</sup>

#### 1. Clarification to the Per-Subscriber Minimum and/or Subscriber-Based Royalty Floor for Family Subscription Plans

**AM-F-26.** First, with regard to family subscription plans, Amazon's proposal includes language to make clear that the per-subscriber minimum and/or subscriber-based royalty floor for family plans applies on an account level (and does not apply to each individual user associated with the family plan subscription). Trial Ex. 1 (Mirchandani-WDT ¶ 75); 3/15/17 Tr. at 1321:15-18 (Mirchandani).

#### 2. Discounts to the Per-Subscriber Minimum and Subscriber-Based Royalty Floor for Student Subscription Plans

**AM-F-27.** Second, with regard to student subscription plans, Amazon's proposal includes a discount to the per-subscriber minimum and subscriber-based royalty floor of 50%. Trial Ex. 1 (Mirchandani-WDT ¶ 81); 3/15/17 Tr. at 1321:5-10, 1322:22-1323:12 (Mirchandani); 3/16/2017 Tr. at 1452:1-6 (Mirchandani).

#### 3. Discounts to the Subscriber-Based Royalty Floor for Annual Subscription Plans

**AM-F-28.** Third, with regard to annual subscription plans, Amazon's proposal includes a discount to the per-subscriber minimum and subscriber-based royalty floor of 16.67% to reflect a customary discounts offered to consumers as well as rates used in direct deals. Trial Ex. 1 (Mirchandani-WDT ¶ 84); 3/15/17 Tr. at 1323:19-21 (Mirchandani).

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<sup>2</sup> While Amazon's proposed rates and terms do not include definitional additions for the terms "Play" and "Fraudulent Stream," for all of the reasons set forth in the Services' Joint Proposed Findings of Fact and Conclusions of Law, Amazon does not oppose the definitional additions for the terms "Play" and "Fraudulent Stream" proposed by other services.

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**4. Royalty Deductions for App Store and Carrier Billing Fees**

**AM-F-29.** Finally, Amazon proposes revising the regulations to permit royalty calculations to be reduced by the amount of app store and carrier billing fees. Trial Ex. 1 (Mirchandani-WDT ¶ 87); 3/15/2017 Tr. at 1321:5-10, 1326:4-17. Amazon proposes a reduction in the amount of app store and carrier billing fees, capped at 15%. Trial Ex. 1 (Mirchandani-WDT ¶ 89); 3/15/17 Tr. at 1326:14-17 (Mirchandani).

**III. THE EVIDENCE SHOWS THAT AMAZON'S PROPOSAL WILL FOSTER A HEALTHY AND PROSPEROUS INTERACTIVE STREAMING INDUSTRY**

**A. The Current Rates and Terms Foster Diverse Service Offerings that Appeal to a Broad Customer Base and Expand the Volume of Legal Music Consumption**

**1. Music Consumers Have Heterogeneous Preferences**

**AM-F-30.** Consumer preferences for recorded music are neither static nor homogeneous. Trial Ex. 22 (Hubbard-WDT ¶ 2.5); 3/21/17 Tr. at 2179:8-2180:4 (Hubbard). The music market continues to cater to heterogeneous consumer segments. Trial Ex. 22 (Hubbard-WDT ¶¶ 2.5 -2.6); 3/21/17 Tr. at 2175:15-2176:25 (Hubbard). As a June 2016 Report by researchers at RBC Capital Markets stated, "it is very difficult to compare [streaming music] services on an apples [to] apples basis, given the different demographics they serve . . . ." Trial Ex. 22 (Hubbard-WDT ¶ 2.6).

**AM-F-31.** For example, in March of 2013, Nielsen classified music consumers into six distinct groups, ranging from frequent music listeners and avid fans ("Aficionado Fans," "Digital Fans," and "Big-Box Fans") to casual or passive consumers ("Ambivalent Music Consumers," "Occasional Concert Consumers," and "Background Music Consumers"). Trial Ex. 22 (Hubbard-WDT ¶ 2.5).

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AM-F-32. In June 2014, Nielsen again classified consumers of audio into similar groups based on their frequency of listening. Trial Ex. 22 (Hubbard-WDT ¶ 2.5). For example, the 2014 survey described “Discriminating Audiophiles” as “highly engaged consumers . . . willing to pay for specific content,” while “Background Driving Defaulters” were described as “less engaged.” Trial Ex. 22 (Hubbard-WDT ¶ 2.5).

AM-F-33. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

AM-F-34. [REDACTED]

[REDACTED]

[REDACTED]

AM-F-35. Music consumers also have heterogeneous spending preferences. Trial Ex. 22 (Hubbard-WDT ¶ 2.11); 3/21/17 Tr. at 2180:23-2182:24 (Hubbard); Trial Ex. 249 (Klein-WRT ¶¶ 11, 62-64, 67-68); 3/20/17 Tr. at 1894:19-1895:2 (Marx); 3/16/17 Tr. at 1424:9-1427:12, 1427:17-1428:5, 1428:24-1429:24 (Mirchandani).



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**AM-F-36.** Numerous studies have found that most consumers have a low willingness to pay for recorded music. Trial Ex. 132 (Hubbard-WRT ¶ 2.9); 4/13/17 Tr. at 5900:24-5901:4 (Hubbard); *see e.g.* 3/21/17 Tr. at 2180:5-22 (Hubbard).

**AM-F-37.** As Neal Mohan, former Chief Product Officer at YouTube, has commented, around 80% of music listeners are casual fans. Trial Ex. 22 (Hubbard-WDT ¶ 2.7, n. 16).

**AM-F-38.** A 2017 survey by Robert Klein (the “Klein Survey”)—an expert with nearly 50 years of experience in the field of consumer market research—showed that [REDACTED]

[REDACTED]  
Trial Ex. 132 (Hubbard-WRT ¶ 2.10); 4/13/17 Tr. at 5903:25-5904:1 (Hubbard); Trial Ex. 249 (Klein-WRT ¶¶ 62, 64); 4/6/17 Tr. at 5397:4-10 (Klein). Furthermore, [REDACTED]

[REDACTED]  
[REDACTED] Trial Ex. 132 (Hubbard-WRT ¶ 2.10); 4/13/17 Tr. at 5904:1-4 (Hubbard); Trial Ex. 249 (Klein-WRT ¶¶ 62, 64); 4/6/17 Tr. at 5399:22-5400:3 (Klein).

**AM-F-39.** Similarly, a recent RBC study found that 72% of consumers spent less than \$50 on music in 2015 and 2016 (excluding concerts/live events). Trial Ex. 22 (Hubbard-WDT ¶ 2.5; 3/21/17 Tr. at 21805-2180:15 (Hubbard). A body of studies and survey research bears this out, and indeed shows that most consumers are not willing to pay *at all* for streaming services. Trial Ex. 22 (Hubbard-WDT ¶ 2.12); 3/21/17 Tr. at 2232:23-2233:3 (Hubbard).

**AM-F-40.** In January 2015, Larry Rosin, President of Edison Research, surveyed consumers in order to understand behavioral characteristics and spending patterns under hypothetical pricing scenarios. Trial Ex. 22 (Hubbard-WDT ¶ 2.13). His survey, conducted as

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part of the Web IV proceedings, found that the “overwhelming majority of consumers” were “not at all likely” or “not very likely” to “pay \$9.99 monthly for an on-demand music service.” Trial Ex. 22 (Hubbard-WDT ¶ 2.13). Mr. Rosin found that when the price was lowered to \$2.99, the number of users who consider themselves “very likely” or “somewhat likely” to subscribe rose nearly 400%, from 12% to 42%. Trial Ex. 22 (Hubbard-WDT ¶ 2.13). Nevertheless, 45% of surveyed consumers remained “not at all likely” and 12% were “not very likely” to subscribe to an on-demand streaming music service at a price of \$2.99 per month. Trial Ex. 22 (Hubbard-WDT ¶ 2.13).

**AM-F-41.** A June 2016 report found that 64% of consumers surveyed were not interested in subscribing to a paid music streaming service. Trial Ex. 22 (Hubbard-WDT ¶ 2.12). These results were nearly unchanged from the same survey conducted a year earlier, in June 2015. Trial Ex. 22 (Hubbard-WDT ¶ 2.12); 3/21/17 Tr. at 2232:23-2233:3 (Hubbard). Similarly, Nielsen’s 2015 United States Music study reported that 78% of respondents indicated they were either somewhat unlikely or very unlikely to pay for a streaming service in the next six months. Trial Ex. 22 (Hubbard-WDT ¶ 2.12). When consumers were asked in a May 2016 survey whether they thought they might pay for music in the future, only 25% indicated some likelihood of doing so. Trial Ex. 22 (Hubbard-WDT ¶ 2.12). The same survey found that 68% of surveyed consumers had not paid for any form of music as of May 2016 over the trailing 30 day period. Trial Ex. 22 (Hubbard-WDT ¶ 2.12).

**AM-F-42.** A July 2016 MusicWatch survey found that among those who did not subscribe to a paid streaming music service, 40% said that “Nothing” would motivate them to pay for a streaming music service, because they were not interested in paying for a music subscription. Trial Ex. 219 (“July 2016 Music Monitor,” MusicWatch at 38); Trial Ex. 132

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(Hubbard-WRT ¶ 2.9). The same survey found that among those who previously paid for a music service and stopped, 31% reported that the cost was too high. Trial Ex. 219 (“July 2016 Music Monitor,” MusicWatch at 77); Trial Ex. 132 (Hubbard-WRT ¶ 2.9).

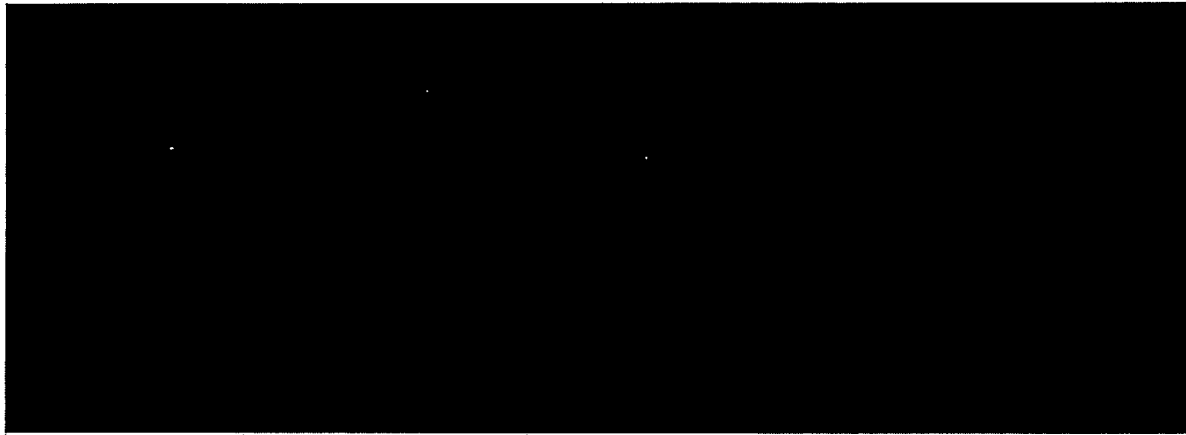
**AM-F-43.** However, some consumer segments exhibit greater willingness to pay for music. As one YouTube executive recognized, “[c]ommitted fans, which make up about 20 percent of consumers, have historically been the only ones who paid for music and made up the vast majority of the industry[’]s revenue.” Trial Ex. 22 (Hubbard-WDT ¶ 2.7).

**AM-F-44.** Data about consumer spending patterns support survey findings of heterogeneous levels of willingness to pay for music. Trial Ex. 22 (Hubbard-WDT ¶ 2.11); 3/21/17 Tr. at 2180:5-2180:22 (Hubbard). A 2015 study by Nielsen estimated annual music spending per person at approximately \$73 per year, but identified considerable variation among different consumer groups based on age. Trial Ex. 2780 (2015 Nielsen Music Report at 25); Trial Ex. 22 (Hubbard-WDT ¶ 2.11). Surveys conducted in 2015 and 2016 found that 16% of consumers (in 2015) and 18% (in 2016) spent more than \$100 per year on music (not including live events). Trial Ex. 2780 (2015 Nielsen Music Report at 25); Trial Ex. 22 (Hubbard-WDT ¶ 2.11); 3/21/17 Tr. at 2180:8-22 (Hubbard); Trial Ex. 1 (Mirchandani-WDT ¶ 28).

**AM-F-45.** [REDACTED]

[REDACTED] Trial Ex. 15 (Brost-WDT ¶ 5); Trial Ex. 1 (Mirchandani-WDT ¶ 22); 3/15/17 Tr. at 1342:21-1344:19 (Mirchandani).

[REDACTED]



AM-F-46. In particular, data from Amazon's digital download store reveals that, in 2013, more than [REDACTED]

[REDACTED] Trial Ex. 15  
(Brost-WDT ¶ 5); Trial Ex. 1 (Mirchandani-WDT ¶¶ 22, 26); 3/15/17 Tr. at 1343:10-23  
(Mirchandani).

**2. Differentiated Streaming Services Attract Consumers with Heterogeneous Preferences**

AM-F-47. Economic theory predicts that diverse product offerings with different features and different prices will enable services to reach a broader consumer base than would be possible with a single, homogeneous product. Trial Ex. 132 (Hubbard-WRT ¶ 2.11); 4/13/17 Tr. at 5946:3-5947:9 (Hubbard); Trial Ex. 1 (Mirchandani-WDT ¶ 35); 3/16/17 Tr. at 1398:8-23 (Mirchandani); Trial Ex. 22 (Hubbard-WDT ¶ 4.4); 3/21/17 Tr. at 2182:2-24 (Hubbard).

AM-F-48. As Dr. Leonard testified: "I personally have studied . . . how important product differentiation is for consumers, because what you have are products with different characteristics and different attributes, and you have people, consumers with different preferences. And when you're able to match up people's preferences to a bunch of . . . different plans, you're able to satisfy consumers' desires better. And that leads to better, you know,

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economic outcomes.” 3/15/17 Tr. at 1118:4-14 (Leonard); Trial Ex. 695 (Leonard-WDT ¶¶ 84, 85).

**AM-F-49.** A strategy of offering multiple pricing tiers across similar but differentiated product types is consistent with price discrimination strategies adopted in other industries. Trial Ex. 22 (Hubbard-WDT ¶ 3.15); 3/21/17 Tr. at 2181:21-2182:1 (Hubbard). The classic example of price discrimination is airline seating, where airlines offer several “classes” of seats, each with different features and amenities, at different price points. Trial Ex. 22 (Hubbard-WDT ¶ 3.15); 3/21/17 Tr. at 2181:2 – 2184:1 (Hubbard). Such price discrimination strategies enable producers to both increase profits and reach a broader consumer base. Trial Ex. 22 (Hubbard-WDT ¶ 3.15); 3/21/17 Tr. at 2182:22-24 (Hubbard).

**AM-F-50.** The Klein Survey provides empirical evidence of how differentiated offerings—and in particular, offerings with different pricing options—facilitate the expansion of legal music consumption. Trial Ex. 132 (Hubbard-WRT ¶ 2.12); 4/13/17 Tr. at 5908:12-5909:1 (Hubbard). [REDACTED]

[REDACTED]

Trial Ex. 132 (Hubbard-WRT ¶ 2.12); 4/13/17 Tr. at 5908:12-5909:1 (Hubbard); Trial Ex. 249 (Klein-WRT ¶ 68). Specifically, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Trial Ex. 132 (Hubbard-WRT ¶ 2.12); Trial Ex. 249 (Klein-WRT ¶ 70).

**AM-F-51.** The Klein Survey also suggests that free, ad-supported and bundled streaming services can act as a gateway and ultimately a funnel to subscription-based streaming

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services. For example, nearly [REDACTED]

[REDACTED]  
[REDACTED] Trial Ex. 132 (Hubbard-WRT ¶ 2.10, n. 30); Trial Ex. 249 (Klein-WRT ¶¶ 65-66; 68, Table 5). Moreover, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Trial Ex. 249 (Klein-WRT ¶ 66). Thus, [REDACTED]

[REDACTED]  
Trial Ex. 249 (Klein-WRT ¶ 66).

AM-F-52. This effect is consistent with studies on “freemium” marketing strategies, whereby consumers are attracted to a limited version of a service by its low price and, after growing accustomed to the service, decide to upgrade to a fuller offering. Trial Ex. 205 (“Making Freemium Work,” The New York Times). For example, according to a July 2016 MusicWatch report, “22% of free trialists report converting to the paid version, mostly motivated by on-demand features, overall value, and ability to skip ads.” Trial Ex. 219 (July 2016 Music Monitor, MusicWatch at 5).

AM-F-53. Moreover, among the [REDACTED]

[REDACTED]  
[REDACTED] For these [REDACTED]  
[REDACTED] Trial Ex. 249 (Klein-WRT ¶ 69-70); 4/6/17 Tr. at 5402:18-5403:8 (Klein); Trial Ex. 132 (Hubbard-WRT ¶ 2.12).

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**AM-F-54.** Consistent with these survey findings, industry participants and analysts recognize the importance of diversified offerings in reaching a broad customer base. Trial Ex. 132 (Hubbard-WRT ¶ 2.13). According to Pandora's CFO Michael Herring, "having a diverse set of offerings so that you can address multiple consumer preferences is how we optimize a marketplace...." 3/14/17 Tr. at 884-885 (Herring); Trial Ex. 880 (Herring-WDT ¶ 9). Moreover, per a recent RBC report, Pandora "highlighted that they would want to have different offerings at different price points, to appeal not only to power users but also to consumers who only want a lighter product." Trial Ex. 132 (Hubbard-WRT ¶ 2.14); 4/3/17 Tr. at 5897:6-12 (Hubbard).

**AM-F-55.** Furthermore, according to IFPI: "The strength of the industry today is seen in the wide-ranging portfolio of diverse businesses operating in the market. The consumer is now being offered an incredible array of music experiences and artists have more opportunities to reach the widest possible audience." Amazon Trial Ex. 132 (Hubbard-WRT ¶ 2.13).

**AM-F-56.** According to an October 2016 Goldman Sachs Report, "more price points will be introduced," because while "paid streaming addresses the portion of consumers who are willing to pay for better access and convenience," "ad-funded streaming helps address those who are not willing to pay (partly because of piracy) or cannot afford it by shifting illegal streaming to legal, better quality, more convenient streaming services which are equally free for the user." Trial Ex. 132 (Hubbard-WRT ¶ 2.14); 4/3/17 Tr. at 5897:6-12 (Hubbard).

**AM-F-57.** Even the Copyright Owners' own expert, Lawrence Miller, recognized that "[a]s the streaming market becomes increasingly sophisticated, the leading players will have to rely ever more heavily on differentiation strategies." Miller Report at 16 (quoting Trial Ex. 195 ("The End of Freemium for Spotify?," Music Industry Blog)).

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### 3. The Current Rates and Terms Foster Differentiated Streaming Services

**AM-F-58.** The existing rates and terms are expressly designed to foster a diverse array of music offerings. By carving out distinct categories with unique rates, the existing regulatory scheme recognizes that different service types enable different value propositions that appeal to unique segments of customers and also provide different returns to rightsholders based on the nature of the offering. Trial Ex. 1 (Mirchandani-WDT ¶ 34); 3/15/17 Tr. at 1335:3-1336:3 (Mirchandani); Trial Ex. 22 (Hubbard-WDT ¶ 4.5); 3/21/17 Tr. at 2182:2-24 (Hubbard).

**AM-F-59.** The current state of the interactive streaming industry bears this out, as today's interactive streaming platforms are differentiated along numerous dimensions. Trial Ex. 22 (Hubbard-WDT ¶ 2.14); 2/21/17 Tr. at 2176:9-16 (Hubbard).

**AM-F-60.** Ad-supported streaming services appeal to consumers who are unwilling or unable to pay for an interactive streaming service. Trial Ex. 973 ("Music in the Air," Goldman Sachs Report); Tr. Ex. 249 (Klein-WRT ¶ 62, Table 3); 4/6/17 Tr. at 5399:22-5400:3 (Klein). Ad-supported services typically lack some of the features or functionalities that may be present in paid services, including complete mobility (which might facilitate listening on a smartphone), higher quality music streams, or access to larger catalogs with more titles. Trial Ex. 22 (Hubbard-WDT ¶ 2.15). For example, Spotify's ad-supported listeners can access a catalogue of music that is similar in scope to that provided via a paid subscription, but "have less control on their mobile devices, where they can only shuffle among and/or within playlists." Trial Ex. 22 (Hubbard-WDT ¶ 2.15); Trial Ex. 909 (Aguilar-Waldfoegel Working Paper).

**AM-F-61.** Paid subscription services, on the other hand, appeal to consumers with higher willingness and ability to pay for streaming music and generally provide end users with unlimited listening. Trial Ex. 22 (Hubbard-WDT ¶ 2.16). Most paid subscription services also

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provide “limited download” functionality, meaning users can download tracks and listen offline so long as they maintain an active membership. Trial Ex. 22 (Hubbard-WDT ¶ 2.16); Trial Ex. 89 (“Apple Music, Spotify and a Guide to Music Streaming Services,” The New York Times). The majority of ad-supported services do not offer this limited download functionality, and if it is offered it may be limited to a fixed number of limited downloads each month. Trial Ex. 22 (Hubbard-WDT ¶ 2.16).

**AM-F-62.** Other points of differentiation include sound quality, portability, depth of catalog, ease of use, social functions (including integration with third-party social media platforms), and content management options, among others. Trial Ex. 22 (Hubbard-WDT ¶ 2.14); 3/21/17 Tr. at 2181:7-13 (Hubbard).

**AM-F-63.** Pricing varies widely as well. Trial Ex. 22 (Hubbard-WDT ¶ 2.17); 3/21/17 Tr. at 2177:4-2178:25 (Hubbard). At the highest end of the spectrum, TIDAL offers users access to “lossless” interactive streaming (1141 kbps) for \$19.99 per-month. Trial Ex. 22 (Hubbard-WDT) ¶ 2.17. Numerous service providers offer full-catalog services at \$9.99 per-month. Trial Ex. 1 (Mirchandani-WDT ¶ 25); 3/16/17 Tr. at 1420:7-22 (Mirchandani); Trial Ex. 977 (Phillips-WDT ¶ 25); 3/9/17 Tr. at 394:16-25 (Phillips); Trial Ex. 1060 (McCarthy-WDT ¶ 9); Trial Ex. 692 (Levine-WDT ¶ 48); 3/8/17 Tr. at 225:12-15 (Levine); Trial Ex. 1611 (Dorn-WDT ¶ 19); 3/22/17 Tr. at 2456:21-25 (Dorn). Recently, Amazon began offering its full-catalog service—Amazon Music Unlimited—at a two dollar discount of \$7.99 per-month to Amazon Prime members. Trial Ex. (Mirchandani-WDT ¶ 25); 3/16/17 Tr. at 1249:3-23 (Mirchandani). Pandora offers Pandora Plus—an ad-free version of its popular non-interactive streaming service that retails for \$5.00 per-month and offers users unlimited track skips and some limited download functionality. Trial Ex. 877 (Phillips-WDT ¶¶ 22-25); 3/9/2017 Tr. at 23:1-18

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(Phillips). Amazon's Unlimited for Echo offers a full-catalog of music with limited functionality for \$3.99 per-month. Trial Ex. 1 (Mirchandani-WDT ¶¶ 25, 35); 3/16/17 Tr. at 1420:7-22 (Mirchandani). Amazon's Prime Music is provided at no additional cost to anyone who subscribes to Amazon Prime for \$99 per-year. Trial Ex. 1 (Mirchandani-WDT ¶ 35); 3/16/17 Tr. at 1461:17-1462:4 (Mirchandani). Finally, Spotify's ad-supported service is free, apart from the cost of listening to advertisements. Trial Ex. 1060 (McCarthy-WDT ¶ 9); 3/20/17 Tr. at 1834:15-1835:1 (Marx).

**AM-F-64.** Amazon serves as a useful example of the flexibility offered by the current rate structure. In the past, in a retail environment defined first by physical sales, and later by permanent digital downloads, customers with differing consumption preferences could choose to purchase exactly as much music as they wanted, be it one album or five albums or ten albums. Trial Ex. 1 (Mirchandani-WDT ¶ 33); 3/15/17 Tr. at 1342:19-1343:2 (Mirchandani). In that environment, Amazon was able to serve all customer segments with its retail music store. Trial Ex. 1 (Mirchandani-WDT ¶ 33); 3/15/17 Tr. at 1342:19-1343:2 (Mirchandani). But with customers now migrating to streaming offerings in droves, Amazon—and the digital music industry broadly—needs diversified, stratified offerings that appeal to customers of all different purchasing preferences. Trial Ex. 1 (Mirchandani-WDT ¶ 33); 3/15/17 Tr. at 1343:3-1344:19 (Mirchandani).

**AM-F-65.** Amazon has used the existing rates and terms as a guide to build a diverse array of product offerings designed to appeal to a broader set of customers than could be served with a single product offered at a single price point. Trial Ex. 1 (Mirchandani-WDT ¶ 69-72); 3/15/17 Tr. at 1315:21-24 (Mirchandani); Trial Ex. 22 (Hubbard-WDT ¶ 3.16); 3/21/17 Tr. at 2178 (Hubbard). Prime Music, Unlimited for Echo, and Unlimited each offer a different

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experience at a different price point designed to appeal to different consumer segments, measured either in terms of willingness and ability to pay or in terms of preferences for particular features. Trial Ex. 1 (Mirchandani-WDT ¶ 36); 3/15/17 Tr. at 1314:24-1315:14 (Mirchandani); Trial Ex. 22 (Hubbard-WDT ¶ 3.16). Importantly—because it would be time and cost prohibitive to attempt to license these services on an entirely voluntary basis—all three were made possible by the existing rates and terms. Trial Ex. 1 (Mirchandani-WDT ¶ 73); 3/16/17 Tr. at 1398:15-23 (Mirchandani).

### a. Prime Music

**AM-F-66.** Prime Music is substantially different from other streaming services in three important respects that allow it to serve this specific group of consumers. Trial Ex. 22 (Hubbard-WDT ¶ 3.10); 3/15/17 Tr. at 1336:7-1337:20 (Mirchandani).

**AM-F-67.** First, Prime Music features a limited music catalog on a fully interactive basis. Trial Ex. 22 (Hubbard-WDT ¶ 3.10); Trial Ex. 1 (Mirchandani-WDT ¶ 22); 3/15/16 Tr. at 1311:22-1312:8 (Mirchandani). Prime Music offers access to only two million songs, including a limited number of new releases, whereas Amazon's Music Unlimited service offers access to tens of millions of songs including most new releases. By contrast, Spotify offers access to "over 30 million tracks." Apple's advertised music library contains "[o]ver 40 million songs." Several other services offer still broader catalogues. Trial Ex. 22 (Hubbard-WDT ¶ 3.10); Trial Ex. 1 Mirchandani (WDT ¶ 19); Trial Ex. 25 (Size of Song Catalog for Interactive Streaming Providers).

**AM-F-68.** Second, Prime Music offers an interactive streaming platform to Amazon Prime members that is both free of advertisements and free of additional out-of-pocket subscription fees. Trial Ex. 22 (Hubbard-WDT ¶ 3.11); 3/21/17 Tr. at 5969:12-16 (Hubbard); Trial Ex. 1 (Mirchandani-WDT ¶ 21); 3/15/17 Tr. at 1336:7-1337:20 (Mirchandani). This makes

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Prime Music a good fit for customers who are not willing to pay a high price for a streaming service, want access to uninterrupted on-demand streaming music, and do not mind Prime Music's limited catalog. Trial Ex. 22 (Hubbard-WDT ¶ 3.11); Trial Ex. 1 (Mirchandani ¶ 22) 3/15/17 Tr. at 1336:7-1337:20 (Mirchandani).

**AM-F-69.** Third, because Prime Music is available to Amazon Prime members at no additional cost, it may serve as a conduit for users who would not otherwise have been aware of, or who may have been indifferent to, streaming music in general. Trial Ex. 22 (Hubbard-WDT ¶ 3.12); 4/13/17 Tr. at 5913:18-23 (Hubbard); Trial Ex. 1 (Mirchandani-WDT ¶ 9-10); 3/15/17 Tr. at 1336:7-1337:20 (Mirchandani). Most Amazon Prime members are originally drawn to Prime by benefits other than music, like free two-day shipping, or original video content. Trial Ex. 22 (Hubbard-WDT ¶ 3.12); Trial Ex. 1 (Mirchandani-WDT ¶ 9-10); 3/15/17 Tr. at 1337:11-20 (Mirchandani). By exposing these consumers to Prime Music, Amazon is introducing them to something they might not have accessed otherwise, expanding the royalty pool in the immediate term and increasing the likelihood that they will someday convert to a paid subscription where they will generate even more royalties. Trial Ex. 22 (Hubbard-WDT ¶ 3.13); 4/13/17 Tr. at 5905:22-5906:13 (Hubbard); Trial Ex. 1 (Mirchandani-WDT ¶ 36); 3/15/17 Tr. at 1337:11-20 (Mirchandani); Trial Ex. 249 (Klein-WRT ¶¶ 65-66); 4/6/17 Tr. at 5402:18-5403:8 (Klein).

**AM-F-70.** This gives Prime Music an important advantage, as the level of awareness of available digital media platforms varies considerably across consumers. Trial Ex. 22 (Hubbard-WDT ¶ 3.12). A survey taken in 2015 showed that only 75% of respondents were aware of Pandora, 8% of respondents were aware of Rdio, and 42% of respondents were aware of Amazon Music. Trial Ex. 22 (Hubbard-WDT ¶ 3.12 n. 70). Similarly, a 2011 report by Nielsen found that only 63% of global consumers understood the capabilities of streaming, and

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[REDACTED] Trial Ex. 22 (Hubbard-WDT ¶ 3.14); Trial Ex. 28  
(Amazon Streams and Offline Plays per Prime Music Subscriber).

**AM-F-74.** [REDACTED]

[REDACTED] Trial Ex. 22 (Hubbard-WDT ¶ 3.21). [REDACTED]

[REDACTED] Trial Ex. 22 (Hubbard-  
WDT ¶ 3.14); Trial Ex. 27 (Amazon Plays Per User by Service, Amazon and Spotify).

**AM-F-75.** In addition, Prime Music users [REDACTED]

[REDACTED] Trial Ex. 1 (Mirchandani-WDT ¶ 36); 3/15/16 1348:7-15 (Mirchandani);  
Trial Ex. 15 (Brost-WDT ¶ 6); Trial Ex. 17 (Amazon's Prime Music Average Monthly Hours by  
Listener Segment). By contrast, available data indicates that the average Spotify Premium  
subscriber [REDACTED] Trial Ex. 1 (Mirchandani-WDT ¶ 36);  
3/15/17 1348:16-21 (Mirchandani); Trial Ex. 15 (Brost-WDT ¶ 10); Trial Ex. 21 (Spotify  
Estimated Play Hours Per-Month).

**AM-F-76.** [REDACTED]

**b. Unlimited for Echo**

**AM-F-77.** Unlimited for Echo is an ad-free, full-catalog, limited functionality  
interactive streaming service designed to appeal to consumers who want access to a complete  
library of tracks but who do not need the portability of a standard full-catalog service or are

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their understanding varied broadly by age, sex, and region. Trial Ex. 22 (Hubbard-WDT ¶ 3.12 n. 70).

AM-F-71. Furthermore, because Prime Music is designed to appeal to a specific consumer segment, it is unlikely that Prime Music significantly “cannibalizes” users of other forms of media, including, in particular, full-service streaming platforms. Trial Ex. 22 (Hubbard-WDT ¶ 3.21); 3/21/17 Tr. at 2184:18-2185:20 (Hubbard) (“[I]t is not the case that [subscribers] are just jumping around.”). As noted above, Amazon strategically targets consumers who would *not* pay for access to another, full-service streaming platform. Trial Ex. 22 (Hubbard-WDT ¶ 3.12); 3/21/17 Tr. at 2188:-2189:14 (Hubbard); Trial Ex. 1 (Mirchandani-WDT ¶ 21); Trial Ex. 111 (Mirchandani-WRT ¶ 37); 3/15/17 Tr. at 1336:7-1337:20 (Mirchandani). The Copyright Owners provide no evidence that Prime Music draws a substantial number of users who would be willing to pay more for access to a higher tier of service. Trial Ex. 111 (Mirchandani-WRT ¶ 37); 3/21/17 Tr. at 2189 (Hubbard).

AM-F-72. Available data bears this out, indicating that Prime Music is reaching customers that do not listen to enough music to justify the cost of a full-catalog subscription service at \$9.99 per month, but who nevertheless are interested in streaming digital music and who—with the right pricing structure—will contribute to the overall revenue pool. Trial Ex. 1 (Mirchandani-WDT ¶ 36); 3/15/17 Tr. at 1355:21-1357:16 (Mirchandani).

AM-F-73. [REDACTED]  
[REDACTED] Trial Ex. 22 (Hubbard-WDT ¶ 3.14); Trial Ex. 28 (Amazon Streams and Offline Plays per Prime Music Subscriber). In July 2016, the *median* user played [REDACTED] per month. Trial Ex. 22 (Hubbard-WDT ¶ 3.14); Trial Ex. 28 (Amazon streams and Offline Plays per Prime Music Subscriber). [REDACTED]

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unwilling or unable to pay \$9.99 per-month for a streaming music subscription. Trial Ex. 111 (Mirchandani-WRT ¶¶ 14, 16, 19); 3/15/17 Tr. at 1317:18-23 (Mirchandani); Trial Ex. 249 (Klein-WRT ¶ 62) ( [REDACTED] ); Trial Ex. 1 (Mirchandani-WDT ¶ 28). Like Prime Music, Unlimited for Echo is also different from other interactive streaming services in a number of important respects that help it appeal to this specific segment of consumers. Trial Ex. 1 (Mirchandani-WDT at ¶ 28); 3/15/17 Tr. at 1317:18-1319:14 (Mirchandani).

**AM-F-78.** First, while Unlimited for Echo includes access to Amazon Music Unlimited's complete catalog of tracks on a fully interactive basis, it is a limited functionality service that can only be accessed through one of Amazon's proprietary "smart speakers"—a single, internet-connected Alexa-enabled device. Trial Ex. 1 (Mirchandani-WDT ¶ 35); Trial Ex. 111 (Mirchandani-WRT ¶¶ 11, 14); 3/15/17 Tr. at 1317:18-23 (Mirchandani); Trial Ex. 22 (Hubbard-WDT ¶ 3.7). As such, subscribers can only access Unlimited for Echo when they are connected to an active Wi-Fi network, and they do not have access to limited downloads or offline playback. Trial Ex. 111 (Mirchandani-WRT ¶ 14). Unlimited for Echo is also not portable—subscribers cannot listen to music from their desktop computers, smartphones, or other mobile media devices. Trial Ex. 22 (Hubbard-WDT ¶ 3.7); 3/15/17 Tr. at 1317:18-23 (Mirchandani).

**AM-F-79.** Second, the Echo's combination of a voice-user interface, combined with voice activation technology, makes it significantly easier for customers to engage with their streaming music service of choice. Trial Ex. 111 (Mirchandani-WRT ¶ 12, 19); 3/15/17 Tr. at 1318:8-1319:14 (Mirchandani). Amazon developed the Unlimited for Echo service to realize the benefits that a voice-user interface could offer in reaching a broader customer base than already



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being served by other full-catalog streaming offerings. Trial Ex. 111 (Mirchandani-WRT ¶ 12, 19); 3/15/17 Tr. at 1318:8-1319:14 (Mirchandani).

**AM-F-80.** Third, in light of the significant portability and accessibility limitations, on Unlimited for Echo, Amazon is able to offer a full-catalog of tracks for only \$3.99 per-month. Trial Ex. 111 (Mirchandani-WRT ¶ 13); 3/16/17 Tr. at 1413:19-1415:7 (Mirchandani). Both portability and the ability to access music from multiple devices are features that customers value greatly. Trial Ex. 111 (Mirchandani-WRT ¶ 14); 3/16/17 Tr. at 1421:8-13 (Mirchandani); [REDACTED]

[REDACTED] As a result, non-portable, streaming-only services are customarily offered at a significant discount to portable subscription services. Trial Ex. 111 (Mirchandani-WRT ¶ 14); 3/16/17 Tr. at 1421:16-1423:22 (Mirchandani).

**AM-F-81.** This difference in value can be observed in the current rate structure: the subscriber-based minimum for a non-portable, streaming only service is \$0.15 per-subscriber per-month, while the subscriber-based minimum for portable subscription services is \$0.50 per-subscriber per-month. Trial Ex. 111 (Mirchandani-WRT ¶ 14); 37 C.F.R. 385, Subpart B. [REDACTED]

**AM-F-82.** Notably, by the end of 2016, [REDACTED]  
[REDACTED] Trial Ex. 111 (Mirchandani-WRT ¶ 18); 3/16/17 Tr. at

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1419:10-14 (Mirchandani); Trial Ex. 116 (Global Amazon music Weekly Business Review, Week 50 at 19).

**AM-F-83.** [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**c. Amazon Music Unlimited**

**AM-F-84.** Unlimited is an ad-free, full-catalog interactive streaming service designed to appeal to highly engaged music consumers who value catalog size, functionality and portability and who are willing and able to pay for it. Trial Ex. 1 (Mirchandani-WDT ¶ 26); 3/15/17 Tr. at 1319:12-17 (Mirchandani).

**AM-F-85.** Like many other full-catalog streaming services, Unlimited has a catalog of tens of millions of songs, includes new releases, and offers customers thousands of curated playlists and personalized stations. Trial Ex. 1 (Mirchandani-WDT ¶ 24); 3/15/17 Tr. at 1317:13-16 (Mirchandani). Also like other full-catalog services, Unlimited is portable, may be accessed from any number of devices, and includes limited downloads for offline playback. Trial Ex. 1 (Mirchandani-WDT ¶ 24).

**AM-F-86.** Unlike other full-catalog services offerings, however, Unlimited has a two-tiered pricing scheme: \$7.99 per-month for Amazon Prime members and \$9.99 per-month for non-Prime members. Trial Ex. 1 (Mirchandani-WDT ¶ 25); 3/15/17 Tr. at 1317:13-1318:7 (Mirchandani).

**AM-F-87.** Evidence indicates that Amazon's discounted pricing scheme works to expand the market for music streaming. [REDACTED]

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[REDACTED]

AM-F-88. Like with both Prime Music and Unlimited for Echo, Unlimited—and its discounted, market expanding pricing plan—were designed to fit and function within the existing rates and terms, and without the standalone portable subscription category. Trial Ex. 1 (Mirchandani-WDT ¶¶ 72-73); 3/15/17 Tr. at 1317:24-1318:7 (Mirchandani). [REDACTED]

[REDACTED]

4. Legal Music Consumption is Expanding Under the Current Rates and Terms

AM-F-89. Industry metrics indicate that the wide array of streaming services offered under the existing rates and terms have driven expansion across the music industry. Paid subscriptions to streaming services increased 40% from 2014 to 2015, from an annual average of 7.7 million in 2014 to 10.8 million in 2015. Trial Ex. 1 (Mirchandani-WDT ¶ 53); 3/15/17 Tr. at 1368:13-22 (Mirchandani); Trial Ex. 7 (News and Notes on 2014 RIAA Music Industry Shipment and Revenue Statistics). This increase drove paid subscription revenues up from \$800 million in 2014 to \$1.2 billion in 2015. Trial Ex. 1 (Mirchandani-WDT ¶ 53); 3/15/17 Tr. at

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1368:23-1369:3 (Mirchandani); Trial Ex. 7 (News and Notes on 2014 RIAA Music Industry Shipment and Revenue Statistics). During the same period, total U.S. digital music revenues were also up, from \$4.5 billion in 2014 to nearly \$4.8 billion in 2015. Trial Ex. 1 (Mirchandani-WDT ¶ 53); Trial Ex. 7 (News and Notes on 2014 RIAA Music Industry Shipment and Revenue Statistics).

**AM-F-90.** Those trends accelerated in 2016: paid subscriptions to streaming services increased 101% from the first half of 2015 (with an average of 9.1 million) to the first half of 2016 (with an average of 18.3 million). Trial Ex. 1 (Mirchandani-WDT ¶ 53); Trial Ex. 7 (News and Notes on 2014 RIAA Music Industry Shipment and Revenue Statistics). This increase drove paid subscription revenues up from \$480 million in the first half of 2015 to more than \$1 billion in the first half of 2016. Trial Ex. 1 (Mirchandani-WDT ¶ 53); 3/15/17 Tr. at 1368:25-1369:3 (Mirchandani); Trial Ex. 7 (News and Notes on 2014 RIAA Music Industry Shipment and Revenue Statistics). Total U.S. digital music revenues also increased, from nearly \$2.3 billion in the first half of 2015 to almost \$2.7 billion in the first half of 2016. Trial Ex. 1 (Mirchandani-WDT ¶ 53); Trial Ex. 10 (News and Notes on 2016 Mid-Year RIAA Music Industry Shipment and Revenue Statistics).

**AM-F-91.** According to Nielsen's 2016 Nielsen Music Mid-Year U.S. Report, total streams are up 97.4%, from 57.5 billion in the first half of 2015 to 113.6 billion in the first half of 2016. Trial Ex. 1 (Mirchandani-WDT ¶ 53); Trial Ex. 918 (2016 Nielsen Mid-Year Report at 2). Total U.S. digital music consumption is also up nearly 15%, from 194.6 million units in the first half of 2015 to 223.5 million units in the first half of 2016. Trial Ex. 1 (Mirchandani-WDT ¶ 53); Trial Ex. 918 (2016 Nielsen Mid-Year Report at 4).

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**AM-F-92.** In addition, after declining slightly from \$7.62 billion in 2010 to \$6.96 billion in 2014, United States recorded music revenues increased to \$7.02 billion in 2015 and continued to increase through 2016. Trial Ex. 132 (Hubbard-WRT ¶ 2.23). Moreover, total music revenues in the first half of 2016 were up 5.7% (in 2015 dollars) from total music revenues in the first half of 2015. This stabilization and recent growth was driven by streaming music revenues, which increased from \$0.5 billion in 2010 to \$2.41 billion in 2015 (and which grew by 54% between the first half of 2015 and the first half of 2016). Trial Ex. 132 (Hubbard-WRT ¶ 2.23); 4/13/17 Tr. at 5975:1-6 (Hubbard).

**AM-F-93.** Moreover, industry reports forecast that diverse streaming music services will continue to drive revenue growth in the music industry. For example, according to analysts at Cowen and Company, “the US Music industry is getting healthy again after a long drought and is at an inflection point led by On Demand and Ad Supported streaming platforms.” According to that report, United States recorded music revenues will increase from approximately \$7 billion to \$8.7 billion between 2016 and 2021, with on-demand revenue doubling from \$1.7 billion to \$3.5 billion over the same period. Trial Ex. 2729 (Cowen and Company Report).

**AM-F-94.** Morgan Stanley analysts similarly “expect 30M total paid subscribers in the US by 2020E, up from prior estimates of ~25M, generating ~3.5B+ in streaming subscription revenue.” Trial Ex. 230 (“Pandora Media, Inc.: Managing a Portfolio of Assets,” Morgan Stanley Report at 12).

**AM-F-95.** According to a Goldman Sachs report, “overall [global] music industry (recorded music, music publishing and live music) revenue [is expected] to almost double in size over the next 15 years to \$104 bn from \$54 bn in 2015. Of that \$50 bn revenue growth potential,

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[ ] \$32 bn [is expected] to come from the recorded music segment, which has only started to recover after almost two decades of decline.” Trial Ex. 973 (“Music in the Air,” Goldman Sachs Report at 9). Per this report, of the forecasted \$32 billion in global recorded music growth potential, the primary driver is streaming music’s predicted growth from \$1.4 billion to \$14.1 billion. Trial Ex. 973 (“Music in the Air,” Goldman Sachs Report at 12); Trial Ex. 132 (Hubbard-WRT ¶ 2.24).

**AM-F-96.** Amazon again serves as a useful example. As shown in Amazon’s data, Amazon’s music customer base expanded dramatically after introducing a broader range of music services, beginning with Prime Music in June 2014. Since its introduction, Prime Music has grown in active subscriber count from [REDACTED] in its first month, to [REDACTED] in July 2016 [REDACTED] Trial Ex. 22 (Hubbard-WDT ¶ 3.14); Trial Ex. 26 (Amazon Prime Music Subscribers).

**AM-F-97.** Prime Music significantly increased the number of consumers who engaged with music, generating substantial new revenue. For instance, while only [REDACTED] consumers were served by Amazon’s Download Store in May 2014, the number of consumers served by both the Download Store and Prime Music [REDACTED] by December 2016. Trial Ex. 132 (Hubbard-WRT ¶ 2.22); 4/13/17 Tr. at 5909:8-24 (Hubbard). At more than a [REDACTED] [REDACTED], Prime Music has been able to [REDACTED] the decline in digital-download sales. Trial Ex. 1 (Mirchandani-WDT ¶ 37); Trial Ex. 132 (Hubbard-WRT ¶ 2.22); 4/13/17 Tr. at 5909:8-24 (Hubbard); *see infra* ¶ AM-125.

**AM-F-98.** Further, while tracks purchased from the Download Store [REDACTED] [REDACTED] in July 2014 to [REDACTED] in December 2016, Prime Music plays

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[REDACTED] per month over the same period. Trial Ex. 132 (Hubbard-WRT ¶ 2.22); 4/13/17 Tr. at 5909:8-24 (Hubbard).

**AM-F-99.** In addition, the recently released Amazon Music Unlimited service has shown a strong start with [REDACTED] plays in October 2016, [REDACTED] in November 2016, and [REDACTED] in December 2016. Trial Ex. 132 (Hubbard-WRT ¶ 2.22); 4/13/17 Tr. at 5909:8-24 (Hubbard). Likewise, from launch through January 2017 more than [REDACTED] customers signed up for Amazon Music Unlimited, [REDACTED] which were previously using Prime Music. Trial Ex. 128 (AMU Signups to Date (Dec. 17)).

**AM-F-100.** As Amazon's customer base has expanded through the implementation of these additional services, so too have its royalty payments. Indeed, Amazon's diverse array of music services have more than compensated for the declining digital-download industry. For example, as total digital-download track equivalent album sales dropped 5.2% industry-wide between 2013 and 2014, Amazon's total publishing royalty payments (for download sales, locker activity and Prime Music plays) [REDACTED] Trial Ex. 1 (Mirchandani-WDT ¶ 37); Trial Ex. 6 (2014 RIAA Music Industry Shipment and Revenue Statistics); *see also* Trial Ex. 15 (Brost-WDT ¶ 7); Trial Ex. 18 (Amazon's Digital Music Publishing Royalties, Jan. 2013 to Dec. 2016). But between 2014 and 2015, as total digital-download sales continued to decline by an additional 11%, [REDACTED]

[REDACTED] Trial Ex. 1 at (Mirchandani-WDT ¶ 37); Trial Ex. 6 (2014 RIAA Music Industry Shipment and Revenue Statistics). [REDACTED]  
[REDACTED] Trial Ex. 1 (Mirchandani-WDT ¶ 37); Trial Ex. 7 (News and Notes on 2015 RIAA Shipment and Revenue Statistics). [REDACTED]

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thereby substantially growing the pie for rightsholders under the current structure. Trial Ex. 1 (Mirchandani-WDT ¶ 37); 3/15/17 Tr. at 1359:19-22 (Mirchandani).

**AM-F-101.** In 2015, Amazon's royalty payments for digital music services (including Cloud Player, Download Store, and Prime Music) were [REDACTED], while the royalty payments for physical music were [REDACTED] Trial Ex. 132 (Hubbard-WRT ¶ 3.8); Trial Ex. 138 (Royalties Paid by Amazon's Music Services). In 2016, the amount of physical music royalty payments maintained a similar level at [REDACTED] and the digital music services royalty payments (including Cloud Player, Download Store, Prime Music, and Amazon Music Unlimited) [REDACTED] of the total royalty payments across Amazon's different music offerings. Trial Ex. 132 (Hubbard-WRT ¶ 3.8); Trial Ex. 138 (Royalties Paid by Amazon's Music Services).

**AM-F-102.** Prime Music royalty payments have [REDACTED] [REDACTED] Trial Ex. 132 (Hubbard-WRT ¶ 3.8); 4/13/17 Tr. at 5970:13-19 (Hubbard); Trial Ex. 138 (Royalties Paid by Amazon's Music Services).

**AM-F-103.** Amazon Music Unlimited royalty payments reached [REDACTED] [REDACTED], only two months after Amazon launched this service. Trial Ex. 132 (Hubbard-WRT ¶ 3.8); Trial Ex. 138 (Royalties Paid by Amazon's Music Services); Trial Ex. 246 ("Amazon Pairs Its Speaker with Streaming Music, at a Bargain Price," The New York Times).

**AM-F-104.** Across all Amazon digital music services, the total royalty payments [REDACTED] [REDACTED] [REDACTED] Trial Ex. 132 (Hubbard-WRT ¶ 3.8); Trial Ex. 138 (Royalties Paid by Amazon's Music Services).



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AM-F-105. [REDACTED]

[REDACTED] Trial Ex. 132 (Hubbard-WRT ¶ 3.9); Trial Ex. 139 (Prime Music Royalties to Record Labels and Publishers). Royalties paid to record labels were [REDACTED] Trial Ex. 132 (Hubbard-WRT ¶ 3.9); Trial Ex. 139 (Prime Music Royalties to Record Labels and Publishers). Royalties paid to publishers [REDACTED] [REDACTED] Trial Ex. 132 (Hubbard-WRT ¶ 3.9); Trial Ex. 139 (Prime Music Royalties to Record Labels and Publishers).

AM-F-106. [REDACTED]

[REDACTED] Trial Ex. 132 (Hubbard-WRT ¶ 3.9); Trial Ex. 140 (Prime Music Publisher Royalties by Royalty Type). Between July 2014 and December 2016, mechanical royalties [REDACTED], and performance royalties [REDACTED] Trial Ex. 132 (Hubbard-WRT ¶ 3.9); Trial Ex. 140 (Prime Music Publisher Royalties by Royalty Type).

**B. Rightsholders Are Faring Well Under the Existing Rates and Terms**

**1. Revenue Sharing Offers Important Benefits**

AM-F-107. A revenue-based rate offers rightsholders an opportunity to share in any upside realized by the Services—the more revenues that a service is able to generate, the more royalties it pays to rightsholders. Trial Ex. 132 (Hubbard-WRT ¶ 5.3); 4/13/17 Tr. at 5928:2-17 (Hubbard); 3/8/17 Tr. at 232:18-24; 233:14-15 (Levine). For example, under Amazon's proposal, when a service like Tidal sells a high-fidelity subscription for \$19.99 per-month, rightsholders share in the extra revenue. The fact that this is not always true as a practical matter—as, for example, when a bundled subscription service [REDACTED] reports zero service revenue—does nothing to change the fact that revenue sharing can and often does work

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to align interests and facilitate positive outcomes for all parties. Trial Ex. 132 (Hubbard-WRT ¶¶ 5.2-5.6); 4/6/17 Tr. at 5258:2-5260:11 (Leonard).

**AM-F-108.** Moreover, even in the situation of a bundled subscription service like Prime Music, there is little justification to eliminate the opportunity for revenue sharing. [REDACTED]

[REDACTED] there are countless [REDACTED] permutations of bundles that would result in sharable service revenue. 37 C.F.R. § 385.11 (Service Revenue). [REDACTED]

[REDACTED] 37 C.F.R. § 385.11 (Service Revenue). Further, as discussed below, there are multiple alternative royalty minima designed to ensure that rightsholders are fairly compensated when the revenue prong does not bind. *See Infra* § IV.B.2.

**AM-F-109.** A revenue-based rate can also facilitate risk-sharing between service providers and rightsholders which encourages investments and innovation by service providers that is necessary for the expansion of the streaming music market, all while protecting them from downside risk as discussed in greater detail below. Trial Ex. 132 (Hubbard-WRT ¶ 5.3).

**AM-F-110.** The benefits of revenue-sharing contracts are documented extensively in economics studies. Trial Ex. 132 (Hubbard-WRT ¶ 5.3). Studies have found that revenue-sharing contracts facilitate the coordination of the supply chain, thereby maximizing the combined profits of the suppliers (i.e., copyright holders in the context of streaming services) and retailers (i.e., digital service providers). Trial Ex. 132 (Hubbard-WRT ¶ 5.3); Trial Ex. 200 (“Supply Chain Coordination with Revenue-Sharing Contracts: Strengths and Limitations,”

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Management Science); Trial Ex. 212 (“Manufacturer’s revenue-sharing contract and retail competition,” European Journal of Operational Research); Trial Ex. 199 (“Effort, Revenue, and Cost Sharing Mechanisms for Collaborative New Product Development,” Management Science).

**AM-F-111.** Studies also find that revenue-sharing reduces risks and uncertainty faced by retailers. Trial Ex. 132 (Hubbard-WRT ¶ 5.3). For instance, a 2012 study showed that movie distributors’ reliance on revenue-sharing contracts is motivated by “the uncertainty about the value of any given movie in any given market at the time of contracting.” Trial Ex. 132 (Hubbard-WRT ¶ 5.3); Trial Ex. 202 (“Using revenue Sharing to Implement Flexible Prices: Evidence from Movie Exhibition Contracts,” The Journal of Industrial Economics).

**AM-F-112.** Because of their benefits to both suppliers and retailers, revenue-sharing contracts have been widely used in several industries, such as the entertainment, telecommunication, pharmaceutical, sports leagues, and software industries. Trial Ex. 132 (Hubbard-WRT ¶ 5.4); 4/13/17 Tr. at 5931:11-20 (Hubbard); *see, e.g.*, Trial Ex. 207 (Vertical Contracts in the Video Rental Industry); Trial Ex. 228 (Raising Price Target Based On Booked Rev Outlook And AT&T Rev Share; Reit OP”, Piper Jaffray); Trial Ex. 199 (Effort, Revenue, and Cost Sharing Mechanisms for Collaborative New Product Development,” Management Science) ; Trial Ex. 204 (“Revenue Sharing and Competitive Balance in Professional Team Sports,” Journal of Sports Economics); Trial Ex. 213 (“Revenue Sharing is the Optimal Contractual Form for Emerging App Economy?”, 2010 International Conference on Information and Communication Technology Convergence). A widely studied example is Blockbuster Inc.’s revenue-sharing contracts. Trial Ex. 132 (Hubbard-WRT ¶ 5.4); 4/13/17 Tr. at 5931:11-5932:2 (Hubbard); Trial Ex. 200 (“Supply Chain Coordination with Revenue-Sharing Contracts: Strengths and Limitations,” Management Science).

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**AM-F-113.** Video retailers like Blockbuster faced the challenge that the peak popularity of a rental title lasted only a few weeks, but the cost of a tape was high relative to the rental price. Trial Ex. 132 (Hubbard-WRT ¶ 5.4). To resolve this challenge, Blockbuster devised revenue-sharing deals with its suppliers in 1998, under which Blockbuster paid its suppliers a portion of its rental income in exchange for a substantial reduction in the initial price per tape. Trial Ex. 132 (Hubbard-WRT ¶ 5.4). Blockbuster's introduction of revenue sharing coincided with a significant improvement in its performance, with its market share increasing from 24% in 1997 to 40% in 2002. Trial Ex. 132 (Hubbard-WRT ¶ 5.4); Trial Ex. 200 ("Supply Chain Coordination with Revenue-Sharing Contracts: Strengths and Limitations," Management Science).

**AM-F-114.** Amazon's current license agreements with Sony Music Entertainment, Universal Music Group, and Warner Music, Inc. provide examples of such contracts in the digital music context. Trial Ex. 132 (Hubbard-WRT ¶ 5.5); Trial Ex. 142 (Sound Recording Royalty License Agreements for Amazon Music Unlimited). In these agreements, Sony, UMG, and Warner licensed to Amazon [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**AM-F-115.** A revenue-based royalty rate can be beneficial for both the rightsholders and Services. Trial Ex. 132 (Hubbard-WRT ¶ 5.6); 4/13/17 Tr. at 5897:13-17, 5898:17-5899:19 (Hubbard). This is particularly true for the interactive streaming music industry, which requires continual investments to broaden market reach and expand legal music consumption. Trial Ex. 132 (Hubbard-WRT ¶ 5.6); 4/13/17 Tr. at 5928:2-17 (Hubbard).

**2. The Existing Rates and Terms Ensure Fair Compensation Even When Revenue is Impractical to Calculate**

**AM-F-116.** A revenue-based rate is not the only mechanism that determines mechanical royalty payments under the current regulatory structure. Trial Ex. 132 (Hubbard-WRT ¶ 5.7). The current rates and terms provide different royalty rates and calculation methods for distinct service categories and product types, each of which includes a variety of alternatives to revenue in order to accommodate the specific circumstances of an individual service. Trial Ex. 132 (Hubbard-WRT ¶ 5.7, 5.8). Minimum royalty rates that are based on alternatives to revenue protect rightsholders from the risk that revenues may be too low or impractical to calculate. Trial Ex. 132 (Hubbard-WRT ¶ 5.7).

**AM-F-117.** Amazon's Prime Music service provides an important example. Under the existing rates and terms (and Amazon's current proposal), the bundled subscription service category features a royalty calculation predicated on the greatest-of three distinct metrics: (1) 10.5% of service revenue, less amounts paid for performance royalties; (2) 21% of royalties paid to record labels for rights to use sound recordings (known as Total Content Costs, or

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“TCC”), less amounts paid for performance royalties; and (3) \$0.25 per-active user per-month.

37 C.F.R. §§ 385.12-13; Trial Ex. 1 (Mirchandani-WDT ¶ 31). [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] Trial Ex. 132 (Hubbard-WRT ¶ 5.8); 3/16/17 Tr. at 1433:2-1434:4 (Mirchandani). [REDACTED]

[REDACTED]  
[REDACTED] Trial Ex. 132 (Hubbard-WRT ¶ 5.9); 3/16/17 Tr. at 1434:13-24 (Mirchandani).

**AM-F-118.** In the case of Prime Music, this is a good result for rightsholders. In other service categories, the percentage of TCC prong is nested as a lesser-of calculation along with other per-subscriber royalty amounts, effectively preventing it from offering any real upside. 37 C.F.R. §§ 385.12-13. For example, in the portable subscription services category, 10.5% of revenue (in Amazon’s case, the equivalent of about [REDACTED] of TCC on a full-price subscription) is compared to the lesser-of (1) 21% of TCC and (2) \$0.80 per-subscriber (in Amazon’s case, the equivalent of about [REDACTED] of TCC on a full-price subscription). *See, e.g.*, Trial Ex. 162 [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] In the bundled subscription services category, on the other hand, there is no lesser-of calculation, so rightsholders earn 21% of TCC *at a minimum*. Further, the better the record labels do in their direct deals, the better publishing rightsholders will do as well. 37 C.F.R. §§ 385.12-13.

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AM-F-119. Moreover, if the TCC prong does not bind, rightsholders are guaranteed to receive \$0.25 per-active user month. 37 C.F.R. §§ 385.12-13. This is a critical difference between Amazon's rate proposal and those being offered by the other services participating in this proceeding: Amazon recognizes the important role that such subscriber-based royalty floors play in ensuring that rightsholders are fairly compensated, whereas other services would eliminate them without offering any viable alternative. Trial Ex. 111 (Mirchandani-WRT ¶ 83); 3/15/17 Tr. at 1331:17-1332:3 (Mirchandani); *see, e.g.* Spotify Inc.'s Second Amended Proposed Section 115 Rates and Terms, *Phonorecords III*, 16-CRB-0003-PR (2018-2022) at I.C.

AM-F-120. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3 [REDACTED]

[REDACTED]

\_\_\_\_\_

\_\_\_\_\_

### 3. The Existing Rates and Terms Have Fueled a Resurgence in the Music Industry

AM-F-123. From 2014 to 2015, the Copyright Owners' revenue from performance royalties [REDACTED] 3/29/17 Tr. at 3734:5-9 (Israelite); Trial Ex. 306 (Copyright Owners' Revenue Spreadsheets).



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**AM-F-124.** From 2014 to 2015, the Copyright Owners' revenue from synchronization royalties [REDACTED] 3/29/17 Tr. at 3734:13-15 (Israelite); Trial Ex. 306 (Copyright Owners' Revenue Spreadsheets).

**AM-F-125.** From 2014 to 2015, the Copyright Owners' revenue from other royalty sources—such as revenue from lyrics—[REDACTED] 3/29/17 Tr. at 3734:20-23 (Israelite); Trial Ex. 306 (Copyright Owners' Revenue Spreadsheets).

**AM-F-126.** From 2014 to 2015, there was [REDACTED]  
[REDACTED] 3/29/17 Tr. at 3634:2-4, 3739:10-16 (Israelite); Trial Ex. 306 (Copyright Owners' Revenue Spreadsheets).

**AM-F-127.** From 2014 to 2015, there was [REDACTED] in mechanical royalty revenues from sales of physical product, such as CDs, vinyl, and other physical product. 3/29/17 Tr. at 3740:4-17 (Israelite); Trial Ex. 306 (Copyright Owners' Revenue Spreadsheets). Over that same period, there was [REDACTED] in mechanical royalty revenues from permanent digital downloads. 3/29/17 Tr. at 3740:18-24 (Israelite); Trial Ex. 306 (Copyright Owners' Revenue Spreadsheets). Over that same period, there was [REDACTED] in mechanical royalty revenues from ringtones. 3/29/17 Tr. at 3740:25-3741:4 (Israelite); Trial Ex. 306 (Copyright Owners' Revenue Spreadsheets). There was [REDACTED] in a miscellaneous, "other" category, which includes things like locker revenue. 3/29/17 Tr. 3741:15-3742:11 (Israelite); Trial Ex. 306 (Copyright Owners' Revenue Spreadsheets).

**AM-F-128.** From 2014 to 2015, there was [REDACTED] in mechanical royalties from streaming, covering both ad-supported and subscription streaming business models. 3/29/17 Tr. at 3741:5-11 (Israelite); Trial Ex. 306 (Copyright Owners' Revenue Spreadsheets).

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Streaming, [REDACTED]

[REDACTED] 3/29/17 Tr. at 3745:1-7 (Israelite); Trial Ex. 306

(Copyright Owners' Revenue Spreadsheets).

AM-F-129. Thus, the [REDACTED]

[REDACTED] 3/29/17

Tr. at 3745:21-3746:9 (Israelite).

AM-F-130. Industry and analyst reports also project increases in royalty payments to publishers under the current royalty structure. Trial Ex. 132 (Hubbard-WRT ¶ 3.10). In particular, reports find that diverse streaming music services contribute to the realization of additional revenue streams to music publishers. Trial Ex. 132 (Hubbard-WRT ¶ 3.11); Trial Ex. 221 (IBISWorld Industry Report 51223: Music Publishing in the U.S., IBISWorld) (reporting that the "shift toward" new digital platforms, including streaming music services, "has helped music publishers unearth new revenue streams."); Trial Ex. 245 ("The Summer That Streaming Took Over," Wall Street Journal) (reporting that a compilation consisting entirely of previously released singles was not "sold as a download or CD, yet it cracked Billboard's Top 10 solely through streaming of its tracks. Even though the songs had been [previously] released, creating an album out of them brought Epic's artists (and their songs) additional publicity.").

AM-F-131. In addition, because streaming improves discoverability and monetization of back catalogues, revenues are no longer front-loaded to the first months in which a song is released. Trial Ex. 132 (Hubbard-WRT ¶¶ 3.11, 3.13); Trial Ex. 973 ("Music in the Air," Goldman Sachs Report at 4, 13, 57) (forecasting that publisher revenue will "grow to \$7 bn in 2030 from \$4 bn in 2015, with streaming alone adding \$3 bn of revenue," "while the main revenue pool at risk (physical mechanical royalties) is currently worth \$0.6 bn"). Catalogue

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songs (those released more than 18 months ago) accounted for 70% of all streaming volume in 2015, compared to 50% of overall physical and digital album sales. Trial Ex. 132 (Hubbard-WRT ¶ 3.11); Trial Ex. 973 (“Music in the Air,” Goldman Sachs Report at 37).

**AM-F-132.** As a result of additional revenue streams, various industry and analyst reports recognize the benefits that streaming music services have and will provide for publishers as an industry driver moving forward. Trial Ex. 132 (Hubbard-WRT ¶ 3.12). For instance, the IBISWorld report expects that the music publishing industry will continuously benefit from leveraging “technological change” and usage of the “new digital environment.” Trial Ex. 132 (Hubbard-WRT ¶ 3.12); Trial Ex. 221 (IBISWorld Industry Report 51223: Music Publishing in the U.S., IBISWorld); Trial Ex. 973 (“Music in the Air,” Goldman Sachs Report at 4, 24) (predicting that “the increase in streaming consumption will be able to compensate for lower royalty rates,” and stating that “the emergence of new digital distribution models is positive for rights holders.”).

**AM-F-133.** Other industry and analyst reports also project growth of rightsholders’ revenue. Trial Ex. 132 (Hubbard-WRT ¶ 3.13). A June 28, 2016 industry report claims that “mechanicals have started to grow again,” and forecasts solid growth for domestic United States publishing revenues, with an estimated increase of \$300 million from 2015 to 2019. Trial Ex. 132 (Hubbard-WRT ¶ 3.13); Trial Ex. 216 (“Global music publishing 2016,” Enders Analysis at 6). It is also predicted that half of mechanical royalties in the United States by 2019 will be driven by streaming music services. Trial Ex. 132 (Hubbard-WRT ¶ 3.13); Trial Ex. 216 (Global music publishing 2016,” Enders Analysis at 12).

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### **b. The Existing Rates and Terms Facilitate a More Equitable Distribution of Royalties Among Rightsholders**

**AM-F-134.** Because users of streaming services typically have the ability to stream additional songs at no additional cost, users can explore the full catalogue of artists and diversify their consumption of songs and artists in ways that could be cost-prohibitive under a music ownership model. Trial Ex. 132 (Hubbard-WRT ¶ 3.3). Thus, unlike downloads and fixed playlists, streaming facilitates consumer exposure to a wider range of music, fostering exploration and discovery, benefitting a broader range of songwriters, and arguably increasing the range of creative options available to working artists. Trial Ex. 886 (Katz-WRT ¶ 217-18) (discussing mechanisms by which “streaming may generate incentives to create a more diverse array of content”).

**AM-F-135.** Many streaming music services offer increasingly sophisticated curation technology and more personalized services to promote usage and facilitate “library discovery.” Trial Ex. 132 (Hubbard-WRT ¶ 3.3); Trial Ex. 222 (Vivendi: UMG growth not enough to offset uncertainty,” Credit Suisse); Trial Ex. 201 (“Changing Their Tune: How Consumers’ Adoption of Online Streaming Affects Music Consumption and Discovery,” Working Paper); Trial Ex. 238 (“Spotify Listeners Discover Roughly 27 New Artists a month,” Diffuser). Factors such as curation technology and the ability to discovery and stream a wide variety of music has the potential to lead to a more uniform distribution of royalties across a wider selection of artists than would otherwise occur. Trial Ex. 132 (Hubbard-WRT ¶ 3.3).

**AM-F-136.** Analysis of data about Prime Music users who used the service for at least one month between June 2014 and July 2016 supports the conclusion that less well-known artists have benefited from Amazon’s digital music services and the expansion of its consumer base.

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Trial Ex. 132 (Hubbard-WRT ¶ 3.4, n. 68); Trial Ex. 132 (Hubbard-WRT ¶ 3.6); 4/13/17 Tr. at 5914:20-5916:19, 5979:14-5980:7 (Hubbard).

AM-F-137. Between July 2014 (the first full month after Prime Music launched in June 2014) and July 2016, the median subscriber went from [REDACTED] [REDACTED] Trial Ex. 132 (Hubbard-WRT) at ¶ 3.4; 4/13/17 Tr. at 5914:20-5916:19, 5979:14-5980:7 (Hubbard); Trial Ex. 135 (Median number of Artists Played per User per Month).

AM-F-138. During that same two-year period, the number of unique tracks played per month [REDACTED] Trial Ex. 132 (Hubbard-WRT ¶ 3.5). [REDACTED] [REDACTED] [REDACTED] [REDACTED] Trial Ex. 132 (Hubbard-WRT ¶ 3.5); 4/13/17 Tr. at 5914:20-5916:19 (Hubbard).

AM-F-139. A calculation of the Herfindahl-Hirschman index (HHI)—a standard measure of the degree of market concentration—for the artists in each month covered by this dataset shows that the market became [REDACTED] [REDACTED] Trial Ex. 132 (Hubbard-WRT ¶ 3.6); 4/13/17 Tr. at 5914:20-5916:19 (Hubbard); Trial Ex. 191 (Herfindahl-Hirschman Index); Trial Ex. 137 (Herfindahl-Hirschman Index of Monthly Plays for All Artists, July 2014-July 2016) (showing the HHI [REDACTED] over this period).

AM-F-140. The fact that consumers have listened [REDACTED] [REDACTED]

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Trial Ex. 132 (Hubbard-WRT ¶ 3.4);  
4/13/17 Tr. at 5914:20-5916:19 (Hubbard).

### c. The Existing Rates and Terms Discourage Piracy

**AM-F-141.** Industry participants and researchers generally agree that music industry revenue declines between 1999 and 2010 were caused by two distinct factors: digital piracy, and the unbundling of the album. Trial Ex. 132 (Hubbard-WRT ¶ 2.2); Trial Ex. 973 (“Music in the Air,” Goldman Sachs Report at 4). More recently, the music industry has witnessed a resurgence in sales associated with the emergence of streaming music. Trial Ex. 132 (Hubbard-WRT ¶ 2.1); Trial Ex. 111 (Mirchandani-WRT ¶ 40). Diverse streaming music offerings embody features demanded by consumers that encourage competition among digital media providers and offer an alternative to digital piracy. Trial Ex. 132 (Hubbard-WRT ¶ 2.1); 4/13/17 Tr. at 5946:3-5947:9 (Hubbard).

AM-F-142. Digital piracy offers a music option that shares many characteristics with other music products but that is free of charge to the consumer and does not result in royalty payments to rightsholders. Trial Ex. 132 (Hubbard-WRT ¶ 2.3); 4/13/17 Tr. at 5946:23-5947:9 (Hubbard).

**AM-F-143.** Numerous academic studies on the topic find that piracy allowed consumers to substitute away from paid music options, thereby contributing to the rapid decline in recorded music sales around the turn of the century. Trial Ex. 132 (Hubbard-WRT ¶ 2.3); Trial Ex. 203 (“Piracy and the Legitimate Demand for Recorded Music,” The B.E. Journal of Economic Analysis and Policy); Trial Ex. 208 (“The Effect of Piracy on CD Sales: Cross-Section Evidence,” CESifo Working Paper); Trial Ex. 206 (“The Impact of Digital File Sharing on the Music Industry: An Empirical Analysis,” The B.E. Journal of Economic Analysis and Policy); Trial Ex. 214 (“Measuring the Effect of File Sharing on Music Purchases,” Journal of

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Law Economic); Trial Ex. 211 (“Music File Sharing and Sales Displacement in the iTunes Era,” Waldfogel). In the *Phonorecords I* proceeding, the Copyright Owners acknowledged the negative impact of piracy on sales and, ultimately, on royalty payments to Copyright Owners. Trial Ex. 248 (Copyright Owners’ Proposed Findings of Fact, *Phonorecords I*) (“Since 1999, the number of physical phonorecords sold in the United States has steadily declined. . . . The decline in sales of physical phonorecords is attributable in part to piracy. [ . . . ] Songwriters do not get paid for the millions of illegal downloads and pirated CDs of their music that are distributed in violation of the copyright laws. [ . . . ] According to the songwriters, piracy has caused enormous losses for them, and it is one of the factors that has caused some songwriters to give up their careers in the music business.”).

**AM-F-144.** Piracy remains an option for many consumers. Trial Ex. 132 (Hubbard-WRT ¶ 2.5); 4/13/17 Tr. at 5904:15-18 (Hubbard). It is estimated that in 2015, more than 57 million people collectively pirated more than 3.4 billion tracks. Trial Ex. 132 (Hubbard-WRT ¶ 2.5); 4/13/17 Tr. at 5904:15-18 (Hubbard); Trial Ex. 215 (“Annual Music Study 2015 Report to Spotify Ltd,” MusicWatch). This occurs in many ways, including peer-to-peer file sharing sites, streamripping, hard drive file transfers, and downloads from mobile apps and storage lockers. Trial Ex. 132 (Hubbard-WRT ¶ 2.5); Trial Ex. 237 (“Music Industry’s Latest Piracy Threat: Stream Ripping,” The Wall Street Journal).

**AM-F-145.** Another report found that in 2014, 10% of those who stopped purchasing or purchased fewer digital downloads reported doing so due to substitution from file sharing (i.e., piracy). Trial Ex. 132 (Hubbard-WRT ¶ 2.5). The Recording Industry Association of America has recognized that piracy “certainly [remains] in the background when you talk about whether

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shifting illegal streaming to legal, better quality, more convenient streaming services which are equally free for the user”).

**AM-F-149.** By offering a convenient alternative to piracy that is tailored to different music preferences, habits, and willingness to pay, diverse streaming music services can discourage piracy, facilitate music industry expansion, and generate royalty revenues for rightsholders. Trial Ex. 132 (Hubbard-WRT ¶ 2.16); Trial Ex. 973 (“Music in the Air,” Goldman Sachs Report at 4) (“The . . . convenience, accessibility and personalization [of streaming music] has driven more consumption of legal music and greater willingness to pay for it, at a time of improving connectivity and growing consumer preference for accessing rather than owning music. Unlike its predecessor, this ‘second’ digital revolution creates more value for rights holders (rather than destroys it), shifting revenue streams from structurally declining markets (physical, download sales) to a significantly larger new revenue pool (ad-funded and subscription streaming). This shift has enabled the recorded music market to return to growth in 2015 following almost two decades of value destruction led by piracy and unbundling.”).

### **C. Services Roles (and Costs) Have Expanded in the Streaming Era**

**AM-F-150.** Since the *Phonorecords II* settlement, the digital music industry has evolved from one comprised almost exclusively of download stores to one characterized by a diverse array of streaming offerings. Trial Ex. 1 (Mirchandani-WDT ¶ 63); 3/16/17 Tr. at 1459:20-1461:4 (Mirchandani). With that shift, Services’ contributions to the distribution of digital music have expanded. Trial Ex. 1 (Mirchandani-WDT ¶ 63); 3/16/17 Tr. at 1382:11-1383:9 (Mirchandani).

**AM-F-151.** In the past, to build and operate its digital download store, Amazon constructed websites, merchandised music, and filled some editorial roles. Trial Ex. 1 (Mirchandani-WDT ¶ 64).



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**AM-F-152.** Building and operating a fleet of interactive streaming services is an entirely different endeavor. Trial Ex. 1 (Mirchandani-WDT ¶ 64); 3/16/17 Tr. at 1394:11-22 (Mirchandani). To that end, Amazon has made significant investments, including investments in streaming-related technologies, curated playlists, personalized stations and recommendations to facilitate music discovery, expanded availability for multiple platforms, and functionalities like offline playback and synchronized lyrics, among many others. Trial Ex. 1 (Mirchandani-WDT ¶ 64); 3/16/17 Tr. at 1393:25-1397:9 (Mirchandani). Overall, Amazon [REDACTED] [REDACTED] over the past four years in rolling out its services. Trial Ex. 1 (Mirchandani-WDT P 55); 3/16/2016 Tr. at 1397:10-14 (Mirchandani). Furthermore, this aggregate investment represents an [REDACTED] over the five year period since *Phonorecords II*. 3/16/17 Tr. at 1397:15-1398:7 (Mirchandani).

**AM-F-153.** For example, Amazon made substantial investments to ensure that its streaming services can leverage the benefits of a high quality voice-user interface. Trial Ex. 111 (Mirchandani-WRT ¶¶ 13, 19); 3/16/17 Tr. at 1411:9-14 (Mirchandani). Customers using the Echo voice-user interface expect to use natural language queries to ask for music—for example, “Play Hip Hop from 1992” or “Play Happy Reggae Music.” Trial Ex. 111 (Mirchandani-WRT ¶ 13); 3/16/17 Tr. at 1410:20-1411:2 (Mirchandani). Due to Echo’s voice-user interface, rather than returning a set of visual results and letting the customer pick the correct one, the music service starts playing music right away and therefore requires a much higher degree of confidence that it is returning the right music. Trial Ex. 111 (Mirchandani-WRT ¶ 13); 3/16/17 Tr. at 1411:3-8 (Mirchandani). In order to fulfill these functions, Amazon had to improve the quality and breadth of the metadata in its catalog. Trial Ex. 111 (Mirchandani-WRT ¶ 13); 3/16/17 Tr. at 1411:9-14 (Mirchandani). This was (and continues to be) accomplished through a

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combination of manual review and correction of metadata, third party data sources, and machine learning. Trial Ex. 111 (Mirchandani-WRT ¶ 13); 3/16/17 Tr. at 1411:9-14 (Mirchandani). Amazon continues to make investments to optimize its music service for a voice-user interface in order to realize the potential that this technology offers to bring streaming music services to more customers. Trial Ex. 111 (Mirchandani-WRT ¶ 19); 3/16/17 Tr. at 1411:9-14 (Mirchandani).

**AM-F-154.** In 2012—prior to Amazon’s initial investment into streaming music services— Amazon incurred [REDACTED] [REDACTED] Trial Ex. 1 (Mirchandani-WDT ¶ 65). In 2014—the year that Amazon launched Prime Music—this [REDACTED] [REDACTED] Trial Ex. 1 (Mirchandani-WDT ¶ 65). Further, in 2016—following the launch of Unlimited and Unlimited for Echo— [REDACTED] [REDACTED] Trial Ex. 1 (Mirchandani-WDT ¶ 65). In other words, over the last five years, Amazon’s headcount costs have [REDACTED] [REDACTED] Trial Ex. 1 (Mirchandani-WDT ¶ 65). In addition, costs related to technology infrastructure, including computer and storage costs, marketing, and external services have [REDACTED] Trial Ex. 1 (Mirchandani-WDT ¶ 65); Trial Ex. 15 (Brost-WDT ¶ 8).

**AM-F-155.** Meanwhile, rightsholders’ contributions have essentially remained fixed. Trial Ex. 1 (Mirchandani-WDT ¶ 63, 66); 3/16/17 Tr. at 1382:1-1383:9 (Mirchandani).

**D. The Existing Rates and Terms are a Known Quantity**

**AM-F-156.** The *Phonorecords I* and *II* settlements have now been in effect for approximately a decade. Trial Ex. 1 (Mirchandani-WDT ¶ 69). During this time, the digital music landscape matured into an approximately \$7 billion industry. Trial Ex. 1 (Mirchandani-

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WDT ¶ 69); Trial Ex. 12 (Global Music Report 2016). Some of the existing Services built their businesses, or substantial portions of their business, in reliance on the rates embodied in the current regulatory scheme and the preceding *Phonorecords I* settlement. Trial Ex. 1 (Mirchandani-WDT ¶ 69).

**AM-F-157.** Amazon built its digital music business to fit within the current regulatory framework. Trial Ex. 1 (Mirchandani-WDT at ¶¶ 68, 70); 3/15/17 Tr. at 1315:21-1316:13, 1318:2-7 (Mirchandani).

**AM-F-158.** Amazon considered and relied on the existing bundled subscription service definition in 2014 when it decided to build and launch its Prime Music service. Trial Ex. 1 (Mirchandani-WDT ¶ 71); 3/15/17 Tr. at 1315:21-1316:13 (Mirchandani); 37 C.F.R. §§ 385.11-13. The language reflected in C.F.R. §§ 385.11, 385.12, and 385.13(a)(4) allowed Amazon to bundle Prime Music with Amazon Prime, enabling Amazon to bring a limited catalog of music to fans not necessarily inclined to spend more than \$100 per year on a full-catalog service. Trial Ex. 1 (Mirchandani-WDT ¶ 71); 3/16/17 Tr. at 1437:8-1438:10 (Mirchandani); C.F.R. §§ 385.11, 385.12, 385.13(a)(4).

**AM-F-159.** In 2016, Amazon considered and relied on the standalone portable subscription service and standalone non-portable subscription service—streaming only definitions when it decided to build and launch both of its Unlimited services. Trial Ex. 1 (Mirchandani-WDT ¶ 72); 37 C.F.R. §§ 385.11-13.

**AM-F-160.** Moreover, the Copyright Owners recently ratified the economic foundation of the existing regulatory scheme when they settled with the major record labels and agreed to rollover the Subpart A rates for another five years. Trial Ex. 1 (Mirchandani-WDT ¶¶ 52, 60).

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**AM-F-161.** Finally, as detailed above, the current regulatory scheme is continuing to facilitate industry expansion: paid subscriptions to streaming services, paid subscription revenues, total streams, total digital music consumption, and total digital music revenues have all risen over the past two years. Trial Ex. 1 (Mirchandani-WDT ¶¶ 53, 61); Trial Ex. 10 (News and Notes on 2016 Mid-Year RIAA Music Shipment and Revenue Statistics).

### **IV. THE EVIDENCE SHOWS THAT AMAZON'S PROPOSAL WILL IMPROVE UPON THE EXISTING RATES AND TERMS**

#### **A. Clarification to the Per-Subscriber Minimum and/or Subscriber-Based Royalty Floor for Family Subscription Plans**

**AM-F-162.** The current rates and terms are not clear on whether the per-subscriber minimum and subscriber-based royalty floor for family plans apply on an account level or instead to each individual user associated with the family plan subscription. Trial Ex. 1 (Mirchandani-WDT ¶ 75); 3/15/17 Tr. at 1321:11-21 (Mirchandani). As drafted, the existing regulations require payment of a per-subscriber minimum or subscriber-based royalty floor for each "subscriber," independent of whether a "subscriber" pays for an individual plan or a family plan. Trial Ex. 1 (Mirchandani-WDT ¶ 77); *see, e.g.*, 37 C.F.R. § 385.13(a)(3). "Subscriber" is not defined in the regulations. Trial Ex. 1 (Mirchandani-WDT ¶ 77).

**AM-F-163.** The digital streaming industry has coalesced around a 50% premium price for family subscription plans, so that (for example) if a standard individual subscription plan costs \$9.99 per-month, a family subscription plan costs \$14.99 per-month. Trial Ex. 1 (Mirchandani-WDT ¶ 76); 3/15/17 Tr. at 1321:18-21 (Mirchandani). Given this market pricing, the per-subscriber minimum and/or subscriber-based royalty floor for a family account should be equal to 150% of the per-subscriber minimum and/or subscriber-based royalty floor for an individual account. Trial Ex. 1 (Mirchandani-WDT ¶ 75).

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**AM-F-164.** Amazon's proposal includes language to make clear that the per-subscriber minimum and/or subscriber-based royalty floor for family plans applies on an account level, and does not apply to each individual user associated with the family plan subscription. Trial Ex. 1 (Mirchandani-WDT ¶ 75); 3/15/17 Tr. at 1321:15-18 (Mirchandani).

**AM-F-165.** Twenty years ago, a family of four probably would not have purchased four copies of the same album; instead, they all would have shared a single copy. Trial Ex. 1 (Mirchandani-WDT ¶ 76); 3/15/17 Tr. at 1321:11-16 (Mirchandani). Today, it is unlikely that a family of four will purchase four separate streaming service subscription plans to the tune of \$40 per month, particularly with the widespread availability of fully licensed (and unlicensed) free music. Trial Ex. 1 (Mirchandani-WDT ¶ 76); 3/15/17 Tr. at 1324:20-1325:1 (Mirchandani). Family subscription plans thus provide a financial benefit for both service providers and rightsholders because they monetize a market segment that would be highly unlikely to pay a higher price for the service, and would otherwise be lost. Trial Ex. 1 (Mirchandani-WDT ¶ 76); 3/15/17 Tr. at 1322:17-21 (Mirchandani).

**AM-F-166.** Family subscription plans also benefit the music ecosystem in other ways: they expose more people to more music, and as parents share music with their children and teach them about today's high-quality service offerings, it only increases the likelihood that those children will continue to use (and pay for) such services as adults. Trial Ex. 1 (Mirchandani-WDT ¶ 80). This, in turn, increases the pool of potential consumers of digital music and ultimately increases the availability of creative works to the public. Trial Ex. 1 (Mirchandani-WDT ¶ 80).

**AM-F-167.** Amazon's proposal to clarify Services payment obligations on a per subscription basis as opposed to a per individual basis would ensure that everyone gets their fair

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share (but not more) of any additional revenue generated by the sale of a family subscription plan. Trial Ex. 1 (Mirchandani-WDT ¶ 77). Under Amazon's proposal, when a service provider receives a 50% premium for a family subscription plan, both master-side rightsholders (by way of direct deals) and publishing-side rightsholders (by way of a percentage of revenue or, in the alternative, a per-subscriber minimum or subscriber-based royalty floor that is 50% higher than that for an individual subscription plan) would get the same 50% premium. Trial Ex. 1 (Mirchandani-WDT ¶ 78). If digital service providers choose to sell family plans at more than a 50% premium, rightsholders would share in any additional revenue on a percentage basis, because the per-subscriber minimum and subscriber-based royalty floor would not be triggered under such pricing conditions. Trial Ex. 1 (Mirchandani-WDT ¶ 78).

**AM-F-168.** If digital music providers like Amazon were made to pay a per-subscriber minimum or subscriber-based royalty floor for each individual user associated with a family subscription plan, publishing-side rightsholders would receive far more than their fair share—specifically, a 100% premium for a family of two, a 300% premium for a family of four, and a 500% premium for a family of six. Trial Ex. 1 (Mirchandani-WDT ¶ 79); 3/15/17 Tr. at 1322:1-10 (Mirchandani). Such an outcome would be unfair and untenable. Trial Ex. 1 at (Mirchandani-WDT ¶ 79).

**AM-F-169.** Amazon contends this is not an appropriate interpretation under the current regulations, and therefore proposes an amendment to remove any ambiguity and affirm the common-sense understanding that statutory licenses will reflect this widespread industry practice. Trial Ex. 1 (Mirchandani-WDT ¶ 79); 3/15/17 Tr. at 1321:11-21 (Mirchandani). Amazon's proposal ensures that Services will continue to be able to offer family subscription

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plans—an outcome that benefits the entire digital music industry. Trial Ex. 1 (Mirchandani-WDT ¶ 80); 3/16/17 Tr. at 1322:17-21 (Mirchandani).

**B. Discounts to the Per-Subscriber Minimum and Subscriber-Based Royalty Floor for Student Subscription Plans**

**AM-F-170.** Student subscription plans fuel growth in the digital music industry, maximizing the availability of creative works to the public and benefiting service providers and rightsholders. Trial Ex. 1 (Mirchandani-WDT ¶ 83).

**AM-F-171.** Students as a group tend to be both less willing and less able to pay for music. Trial Ex. 1065 (Marx-WDT ¶¶ 14, 133); Trial Ex. 1069 (Marx-WRT ¶¶ 42, 45); 3/20/17 Tr. at 1894:19-1895:2 (Marx); 3/14/17 Tr. at 892:23-893:6 (Herring). Thus, if service providers are able to sign students to lower cost subscriptions, this allows some monetization that would otherwise not occur. Trial Ex. 1 (Mirchandani-WDT ¶ 82); 3/15/17 Tr. at 1322:22-1323:1 (Mirchandani); 3/20/17 Tr. at 1894:19-1895:2 (Marx).

**AM-F-172.** Student subscription plans are an important customer acquisition tool. Trial Ex. 1 (Mirchandani-WDT ¶ 82); 3/15/17 Tr. 1322:24-1323:1 (Mirchandani); 3/21/17 Tr. at 2053-54 (McCarthy) (“[T]he student plan, as an example, we had done some research . . . and the results of the study showed accelerated growth, which, in fact, we’ve seen and we’ve also seen lower churn, better retention, significantly higher lifetime value. And so we consider and they consider those programs to have been quite successful.”). Twenty years ago, students would have purchased physical music like tapes and CDs in record stores. Trial Ex. 1 (Mirchandani-WDT ¶ 82); 3/15/17 Tr. 1323:1-3 (Mirchandani). Today, however, the same demographic is consuming music online. Trial Ex. 1 (Mirchandani-WDT ¶ 82). A recent study found that 56% of 15-to-19 year-olds discover music online via YouTube. Trial Ex. 1 (Mirchandani-WDT ¶ 82); 3/15/17 Tr. 1325:9-16 (Mirchandani).

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**AM-F-173.** Moreover, the specter of digital piracy still looms, Trial Ex. 1 (Mirchandani-WDT ¶ 82); 3/15/17 Tr. 1323:5-6 (Mirchandani), and many students are less willing and/or less able to pay for non-essential goods like music. 3/15/17 Tr. 1324:6-1325:10 (Mirchandani). Discounted student subscription plans allow Services like Amazon to serve these customers, thereby converting non-paying listeners to paying listeners and, at the same time, teaching them to respect the value of music at an early age. Trial Ex. 1 (Mirchandani-WDT ¶ 82); 3/15/17 Tr. 1323:5-12 (Mirchandani). This, in turn, benefits rightsholders by way of increased royalties, both now and in the future. Trial Ex. 1 (Mirchandani-WDT ¶ 82); 3/15/17 Tr. 1323:5-12 (Mirchandani).

**AM-F-174.** If rightsholders encourage student use and share in the cost of enlisting them by means of a discounted per-subscriber minimum and subscriber-based royalty floor, that will help ensure rightsholders and Services a fair return for their respective contributions. Trial Ex. 1 (Mirchandani-WDT ¶ 83).

### **C. Discounts to the Subscriber-Based Royalty Floor for Annual Subscription Plans**

**AM-F-175.** Annual subscription plans are an important customer-retention tool. Trial Ex. 1 (Mirchandani-WDT ¶ 85); 3/16/17 Tr. at 1323:15-16 (Mirchandani). Discounted annual subscription plans provide an incentive to commit to long-term subscriptions, increasing the likelihood that customers renew their subscriptions and decreasing the likelihood that they exit a service. Trial Ex. 1 (Mirchandani-WDT ¶ 85); 3/15/17 Tr. at 1321:16-19, 1325:21-1326:1 (Mirchandani). Discounted annual subscription plans also benefit rightsholders through increased royalties, and benefit committed music fans through discounted pricing. Trial Ex. 1 (Mirchandani-WDT ¶ 85).



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**AM-F-176.** Annual subscription plans encourage customer retention, thereby maximizing the availability of creative works to the public and benefiting the broader digital music industry. Trial Ex. 1 (Mirchandani-WDT ¶ 86); 3/15/17 Tr. at 1323:15-16 (Mirchandani). As with student subscription plans, rightsholders should encourage their use and share in their cost via a discounted per-subscriber minimum and subscriber-based royalty floor, ensuring both rightsholders and digital service providers a fair return for their respective contributions. Trial Ex. 1 (Mirchandani-WDT ¶ 86).

### **D. Royalty Deductions for App Store and Carrier Billing Fees**

**AM-F-177.** At present, certain app store providers allow consumers to make digital music-related purchases, including streaming service subscription purchases, through their app stores as well as through certain specific apps. Trial Ex. 1 (Mirchandani-WDT ¶ 88); 3/15/17 Tr. at 1326:6-9 (Mirchandani). A number of mobile carriers allow consumers to make similar purchases via carrier billing, something that allows a consumer to add the cost of a purchase to their next mobile phone bill. Trial Ex. 1 (Mirchandani-WDT ¶ 88); 3/15/17 Tr. at 1326:9-13 (Mirchandani). These distribution channels make it easier for customers to pay for their subscriptions, which reduces friction. 3/15/17 Tr. at 1326:10-11 (Mirchandani).

**AM-F-178.** Certain app store providers take a cut of all app store-related purchases, and mobile phone carriers also charge similar fees, neither of which are deducted from regulatory royalty calculations. Trial Ex. 1 (Mirchandani-WDT ¶ 89); 3/15/17 Tr. at 1326:12-17 (Mirchandani). As a result, some service providers are being made to pay royalties on revenue that they never see, bearing the whole financial burden of participating in these unique, expansive distribution channels while rightsholders share equally in the rewards. Trial Ex. 1 (Mirchandani-WDT ¶ 89). Lacking the ability to deduct those costs from revenue, it may be cost prohibitive for some service providers to avail themselves of those distribution channels.

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3/16/17 Tr. at 1400:10-24 (Mirchandani). Where the provider of the app store also offers a competing streaming service—so that the service provider ultimately retains (as the app store) the fee that it pays (as the music service provider)—that creates an uneven playing field. *See* 3/16/17 Tr. at 1400:14-20 (Mirchandani).

**AM-F-179.** App-store and carrier billing offerings are unique distribution channels that can serve to expand the industry and thereby maximize the availability of creative works to the public. Trial Ex. 1 (Mirchandani-WDT ¶ 88); 3/15/17 Tr. at 1326:4-9 (Mirchandani). They benefit customers, Services, and rightsholders alike. Trial Ex. 1 (Mirchandani-WDT ¶ 88). For this reason, Services and rightsholders should share in the associated costs. Trial Ex. 1 (Mirchandani-WDT ¶ 88). Amazon proposes permitting royalty calculations to be reduced by the amount of app store and carrier billing fees, capped at 15%. Trial Ex. 1 (Mirchandani-WDT ¶ 89); 3/15/17 Tr. at 1326:14-17 (Mirchandani).

**V. IF A PER-PLAY SCHEME IS UNAVOIDABLE, IT SHOULD RETAIN THE EXISTING SERVICE CATEGORIES AND FEATURE DIFFERENTIATED RATES DESIGNED TO ACCOMMODATE DIFFERENT TYPES OF SERVICES.**

**AM-F-180.** As set forth above, a per-play rate is undesirable and should be avoided, both because it shifts too much risk to Services and because it misaligns incentives in ways that would likely prove to be detrimental to the broader digital music industry. *See* Supra § VI.B. However, *if* the Judges choose to institute a per-play scheme, the existing revenue prong should be replaced with tiered per-play rates, preserving the existing alternative royalty minima. Maintaining the tiered structure and adopting differentiated rates designed to accommodate diverse service offerings is critical to retaining the existing service categories. Trial Ex. 111 (Mirchandani-WRT ¶ 57); 3/15/17 Tr. at 1335:12-1336:3 (Mirchandani).

**AM-F-181.** A variety of service categories with different rate structures are good for service providers, rightsholders, and music consumers. *See* Supra § IV.A. Not all music fans are

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alike, and their collective array of tastes, preferences, listening habits, and budgets demands a diverse selection of service offerings. Trial Ex. 111 (Mirchandani-WRT ¶ 59); 3/15/17 Tr. at 1341:21-1344:19 (Mirchandani). The existing service categories were deliberately designed to do just that, and indeed they have: Amazon alone makes use of six distinct categories to offer six different services that appeal to a broad range of digital music consumers. Trial Ex. 111 (Mirchandani-WRT ¶ 59); 3/15/17 Tr. at 1311:1-4, 1315:21-1314:6, 1317:24-1318:7 (Mirchandani); 3/16/17 Tr. at 1421:16-1422:18, 1424:9-1427:12, 1427:17-1428-5, 1428:24-1429:24 (Mirchandani).

**AM-F-182.** Theoretically, preserving the existing service categories and replacing the current revenue prong with a variety of per-play rates could yield similar results. Trial Ex. 111 (Mirchandani-WRT ¶ 60). The rates would have to be carefully considered, but if calibrated correctly so as not to exceed current effective per-play rates, they could continue to foster the flexibility and innovation which have characterized the existing rates and terms. Trial Ex. 111 (Mirchandani-WRT ¶ 60); 3/15/16 Tr. at 1339:7-1340:13 (Mirchandani). Collapsing the multi-pronged approach in favor of a one-size-fits-all structure, on the other hand, would obstruct this more adaptable calculation.

**AM-F-183.** Of course, even rates predicated on today's effective per-play rates would not account for future engagement growth and would thus expose service providers to additional risk. Trial Ex. 111 (Mirchandani-WRT ¶ 55). As engagement growth can be difficult to predict, this type of rate setting would necessarily be an uncertain endeavor, but it is at least clear that any tiered per-play rates should be set below today's effective per-play rates so as account for (and encourage) the type of growth that benefits the entire music industry.

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CONCLUSIONS OF LAW

**I. RELEVANT AUTHORITY<sup>4</sup>**

**A. 17 U.S.C. § 801(b)(1)(A) through (D)**

**AM-C-1.** Under Section 801(b)(1) of the Copyright Act, the Judges are required:

To make determinations and adjustments of reasonable terms and rates of royalty payments as provided in [17 U.S.C. § 115] . . . . The rates applicable under [§ 115] . . . shall be calculated to achieve the following objectives:

- (A) To maximize the availability of creative works to the public.
- (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
- (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
- (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

**II. AMAZON'S PROPOSAL FURTHERS THE OBJECTIVES OF SECTION 801(B)(1)**

**A. Preserving the Existing Rates and Terms Will Maximize the Availability of Creative Works to the Public**

**AM-C-2.** The Judges' determinations and adjustments of rates "shall be calculated . . . [t]o maximize the availability of creative works to the public." 17 U.S.C. § 801(b)(1)(A).

**1. The Existing Rates and Terms Facilitate Diverse Services That Appeal to a Variety of Customer Segments, Maximizing the Availability of Creative Works to the Public**

**AM-C-3.** The music-consuming public is highly segmented, with consumers exhibiting a wide range of willingness to pay for music. ¶¶ AM-F-30-35. Studies show that

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<sup>4</sup> For a full explication of relevant authority, see Section XIII of the Joint Services' Findings of Fact and Conclusions of Law.

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most consumers have a low willingness to pay for recorded music. ¶ AM-F-36. Numerous studies have found that most consumers have a low willingness to pay for recorded music, but that some segments of the public have a substantially higher willingness to pay. ¶¶ AM-F-36-46. Economic theory dictates that diverse product offerings with different features and different prices will reach a broader consumer base than would be possible with a single, homogeneous product. ¶¶ AM-F-25, AM-F-47-57. Thus, a diversity of services at a diversity of price points maximizes the availability of creative works to the public.

**AM-C-4.** Services have designed a variety of products that target specific consumer segments. Although these products often share similarities, there are also fundamental differences that enable providers to charge different prices in order to reach wider audiences. ¶¶ AM-F-58-63. For example, Amazon has relied on the existing regulatory scheme as a guide in developing a tiered offering designed to appeal to the full range of customer segments. ¶¶ AM-F-22-24.

**AM-C-5.** Amazon's diverse offerings were built around the existing rates and terms, the flexibility of which has enabled the growth of Amazon's digital music business. ¶ AM-F-65. For example, whereas Unlimited serves consumers who are willing to pay full price for access to tens of millions of songs, Prime Music grants users access to only two million songs, thereby serving a segment of consumers who are less willing to pay for music. ¶¶ AM-F-8-12, AM-F-13-15, AM-F-20. Amazon's Prime Music offering also reduces the friction for those customers, introducing them to something they might not have accessed otherwise. ¶ AM-F-12, AM-F-19. As another example, Unlimited for Echo serves customers who may not be willing to pay full price for amenities including the ability to download music for offline use, or the ability to listen to music on multiple devices or in different locations. ¶¶ AM-F-16-18, AM-F-21. These diverse

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services make creative musical works available to a broad customer base comprising a variety of different consumer segments.

**AM-C-6.** Although lower-priced options result in some switching from one service to another, more users are brought into the market as a result of such options. ¶ AM-F-50. Availability of lower-cost tiers increases the availability of works to the public by expanding service offerings that are available to customers with lower ability or willingness to pay. ¶¶ AM-F-25, AM-F-96-106. Indeed, the evidence shows that Amazon's diversity of products has resulted in increased payments to rightsholders.

**AM-C-7.** The availability of a larger variety of products online, combined with search and discovery tools (such as search engines and recommendation systems) might drive consumption to less known artists or music, and to artists or music that were previously less discoverable by the public. ¶¶ AM-F-131-133. This not only helps a wider range of songwriters, but maximizes distribution (and therefore the practical availability) of a range of works to the public.

**AM-C-8.** Because expansion of the consumer base and enhance discoverability benefits less well-known artists, under a system with differentiated rates and terms more artists have the opportunity to benefit from the expansion of the consumer base. ¶¶ AM-F-134-140. In turn, enhancing the ability of lesser known songwriters to make a living increases the number of works that will be available to the public in the future.

**AM-C-9.** Consumer preferences are not static. ¶ AM-F-30-46. For example, consumers increasingly desire convenient, on-demand access to digital content through mobile platforms, and have recently begun to express demand for voice recognition and artificial intelligence software to facilitate the listening experience. ¶ AM-F-179. Evolving preferences

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present continuing opportunities for Services to compete and discriminate on the basis of price and features, broadening the listening base, which in turn expands the revenue base.

### 2. “Availability to the Public” Relates to the Practical Availability of Creative Works

**AM-C-10.** Availability relates to the factors of production, distribution, and pricing of works that makes them available to consumers in the practical sense. 3/20/17 Tr. at 1825 (Marx). Maximizing the availability of works in the practical sense means maximizing the total value created through the market exchange, which is the sum of (1) the value that consumers get from consumption of works, minus what they have had to pay in order to consume, and (2) the total profits to the Copyright Owners and the Services. 3/20/17 Tr. at 1826:23-1827:24 (Marx). For example, because lower prices tend to increase demand and that in turn increases profits to Copyright Owners, lower cost offerings may tend to maximize availability.

**AM-C-11.** Copyright Owners argue instead that works are “available” for purposes of § 801(b)(1)(A) if they are merely capable of being accessed by the public, without consideration of whether they are affordable, actually used, or available to the public in a practical sense. Tr. 3116-18 (Watt); Tr. 3117 (“Q: And in your view availability is maximized if there are lots of inventory of creative works available for sale, even if no one was buying them? A: That’s availability, yes.”); Tr. 3118 (“Q: Let me put it this way. The availability of musical works is not a function of price, necessarily? A: Not necessarily, yes, I think I would agree with that.”). The Copyright Owners provide no factual or legal basis for this argument, and it also makes no sense. Under the Copyright Owners’ binary reasoning, a work is either completely *available*, or completely *unavailable*. But the statute requires to the Judges to “maximize” the availability of works to the public, which presumes that there are different degrees of availability. This

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interpretation makes sense only if “availability” is understood to mean *practical* availability. 17 U.S.C. § 801(b)(1)(A).

**AM-C-12.** Copyright Owners expert Watt argues that “neither the Constitution [sic] wording nor that of 801(b) refer to, nor should be understood as referring to, actual use that is made of works.” Trial Ex. 3034 (Watt-WRT ¶ 10 n.2). The U.S. Constitution empowers the U.S. Congress “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” U.S. Const. Art. I, § 1, Cl. 8. A work that is not practically available and that is not used cannot “promote . . . progress.” Factors that increase the *practical* availability of works to the public better serve both the Constitutional purpose of copyright—to “promote the progress of science”—and the specific goal of this proceeding—to “*maximize* the availability of creative works to the public.” 17 U.S.C. § 801(b)(1)(A) (emphasis added).

### **B. Preserving the Existing Rates and Terms Will Afford Rightsholders a Fair Return and Services a Fair Income under Existing Economic Conditions**

**AM-C-13.** The Judges’ determinations and adjustments of rates “shall be calculated . . . [t]o afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.” 17 U.S.C. § 801(b)(1)(B).

**AM-C-14.** As an initial matter, the existing rates and terms offer important benefits to both service providers and rightsholders. ¶¶ AM-F-107-115. The revenue sharing component of the existing regulatory scheme provides an opportunity for upside profit sharing. ¶ AM-F-107. A revenue-based rate calculation also facilitates risk-sharing between service providers and rightsholders that encourages investments and innovation necessary for the growth of the streaming industry. ¶¶ AM-F-109-114.



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**AM-C-15.** In addition, when revenue is low or impractical to calculate, the existing rates and terms include multiple alternatives to revenue that work to ensure that rightsholders are fairly compensated in a variety of scenarios. For instance, for a bundled subscription service [REDACTED] [REDACTED] the TCC prong provides rightsholders another opportunity for upside sharing, and—as record evidence indicates—the subscriber-based royalty floor provides a guaranteed mechanical-only royalty that is more than fair. ¶ AM-F-108.

**AM-C-16.** Perhaps most importantly, service providers (including Amazon) have relied on the existing regulatory scheme to build a robust array of offerings designed to appeal to a broad range of customer segments. ¶¶ AM-F-65-88. By carving out distinct categories with unique rates, the existing scheme recognizes that different service types enable different value propositions that appeal to unique segments of customers and also provide different returns to rightsholders based on the nature of the offering. ¶ AM-F-58.

**AM-C-17.** Notably, industry metrics indicate the existing rates and terms are having a positive effect. ¶ AM-F-89. From 2014 to 2015—the most recent period for which comprehensive financial results are available—the total annual revenue for the Copyright Owners [REDACTED] ¶ AM-F-122. During that time period, there was a [REDACTED] in mechanical royalties from streaming. ¶ AM-F-128. Although there was a [REDACTED] [REDACTED] [REDACTED] ¶¶ AM-F-126-127. By contrast, streaming accounted for approximately [REDACTED] of the Copyright Owners' mechanical royalty revenues in 2015, [REDACTED] [REDACTED] ¶ AM-F-128.

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**AM-C-18.** A variety of academic and industry studies have shown that streaming music products in their various forms have reduced piracy. ¶ AM-F-146. “Streaming services have . . . helped migrate consumers to licensed services by offering a convenient alternative to piracy.” ¶ AM-F-146. For example, ad-supported streaming music services tend to shift illegal streaming to legal, better quality, more convenient streaming services which are equally free for the user, and have made a substantial contribution to the decline in digital piracy. ¶¶ AM-F-147-148. The fact that users who might otherwise pirate music may choose to use a low-cost legal, royalty-paying service instead plainly benefits rightsholders and helps afford the Copyright Owners a fair return for their creative work. ¶ AM-F-149.

**AM-C-19.** Criticisms that the existing regulatory scheme is too complex are irrelevant to any of the statutory § 801(b)(1) factors. Where a complex system serves the statutory goals, there is no basis to prefer simplicity for simplicity’s sake. *See generally* Section 801(b)(1). There is no dispute that rightsholders would be satisfied with an equally complex scheme that resulted in higher royalty payments to them (just as Services would likely be satisfied with an equally complex scheme that resulted in lower royalty payments).

**AM-C-20.** The Copyright Owners recently endorsed the economic underpinnings of the existing regulatory scheme when they settled with all three major record labels, agreeing that the royalty rates and terms presently set forth in 37 C.F.R. 385 Subpart A should be continued for the rate period now at issue. ¶ AM-F-160. Notably, if the Rights Owners are willing to rollover the Subpart A rates for a declining business where service provider investment has slowed to a crawl, the should certainly be willing to do the same for Subpart B rates given the substantial investments that Services are currently making in the streaming space. ¶¶ AM-F-150-154.

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**AM-C-21.** Accordingly, on balance, the Judges should retain the existing rates and terms.

**C. The Existing Rates and Terms Already Reflect the Relative Roles of Rightsholders and Services**

**AM-C-22.** The Judges' determinations and adjustments of rates "shall be calculated . . . [t]o reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication." 17 U.S.C. § 801(b)(1)(C).

**AM-C-23.** To attract and retain consumers, streaming music providers continue to innovate on their business models and invest in the development of novel music delivery vehicles. ¶¶ AM-F-150-155.

**AM-C-24.** Since the *Phonorecords II* settlement, the digital music industry has evolved from one comprised almost exclusively of download stores to one characterized by a diverse array of streaming offerings. ¶ AM-F-150. With that shift, Services' contributions to the distribution of digital music have expanded enormously. ¶ AM-F-150. Building and operating a streaming offering like Amazon Music Unlimited involves significant and ongoing investment and innovation in streaming-related technologies, curated playlists, personalized stations and recommendations to facilitate music discovery, expanded availability for multiple platforms, and functionalities like offline playback and synchronized lyrics, among many others. ¶¶ AM-F-152-154. Meanwhile, rightsholders' contribution to the industry have remained unchanged. ¶ AM-F-155.

**AM-C-25.** Streaming music services such as Amazon's benefit less well-known artists, fostering careers and affording such artists an improved opportunity to make a fair return

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on their creative works. ¶¶ AM-F-134-135. Factors such as curation technology and the ability to discovery and stream a wide variety of music has the potential to lead to a more uniform distribution of royalties across a wider selection of artists than would otherwise occur. ¶ AM-F-135. For example, the evidence shows that consumers of Amazon’s streaming services, such as Prime Music, have listened to a more diverse selection of artists over time, indicating that more artists have the opportunity to benefit from the expansion of Amazon’s consumer base. ¶¶ AM-F-136-140.

**AM-C-26.** Accordingly, the Judges should retain the existing rates and terms.

**AM-C-27.** Furthermore, in light of the fact that Services’ technological contributions, capital investment, risk, and the opening of new markets for creative expression have substantially increased since *Phonorecords II*, while Copyright Owners’ contributions have remained flat, if the Judges are inclined to alter the existing regulatory scheme, rates should be decreased—not increased—to more accurately reflect the economic realities of the streaming era. ¶¶ AM-F-150-155.

### **D. Preserving the Existing Rates and Terms Will Minimize Disruption in the Streaming Industry**

**AM-C-28.** The Judges’ determinations and adjustments of rates “shall be calculated . . . [t]o minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.” 17 U.S.C. § 801(b)(1)(D).

**AM-C-29.** Amazon built its digital music business to fit within the current regulatory framework, and a significant change would be exceedingly disruptive to Amazon, its customers, and the broader digital music industry. ¶ AM-F-157.

**AM-C-30.** For a decade, Services have operated under the same basic licensing scheme the CRB set forth in its determinations based upon the *Phonorecords I* and *II*

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settlements. The streaming industry, which barely existed at the beginning of this period, developed and matured almost entirely under this basic scheme. Service providers that offer streaming services have largely or entirely built those businesses in reliance on the rates and terms embodied in the current regulatory scheme. ¶ AM-F-156.

**AM-C-31.** For example, Amazon considered and relied on the existing bundled subscription service definition in 2014 when it decided to build and launch its Prime Music service. ¶ AM-F-158. The existing rates and terms also allowed Amazon to bundle Prime Music with Amazon Prime, enabling Amazon to bring a limited catalog of music to fans not necessarily inclined to spend more than \$100 per year on a full-catalog service. ¶ AM-F-158. In 2016, Amazon considered and relied on the standalone portable subscription service and standalone non-portable subscription service—streaming only definitions when it decided to build and launch both of its Unlimited services. ¶ AM-F-159.

**AM-C-32.** A significant departure from the current regulatory scheme, on the other hand, would be seriously disruptive to digital-music business built in reliance on the existing rates and terms and to the customers who use those services. *See Services' Joint Proposed Findings of Fact and Conclusions of Law at Section VIII.*

**E. Amazon's Proposed Adjustments to the Existing Rates and Terms Will Also Serve to Further the Section 801(b)(1) Objectives**

**1. Clarification to the Per-Subscriber Minimum and/or Subscriber-Based Royalty Floor for Family Subscription Plans**

**AM-C-33.** The regulations are not clear on whether, with regard to family subscription plans, the per-subscriber minimum and/or subscriber-based royalty floor applies on an account level, or whether it applies to each individual user associated with the family plan subscription. ¶ AM-F-162. As drafted, the regulations require payment of a minimum or royalty floor for each "subscriber," with regard to whether a "subscriber" pays for an individual plan or a

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### 4. Royalty Deductions for App Store and Carrier Billing Fees

**AM-C-42.** App-store and carrier billing offerings are unique distribution channels that can serve to expand the industry and thereby maximize the availability of creative works to the public, thereby benefitting customers, Services, and rightsholders alike. ¶ AM-F-179.

**AM-C-43.** Certain app store providers charge a percentage or fee for all app store-related purchases, and mobile phone carriers also charge similar fees. ¶¶ AM-F-177-178. Under the current rates and terms, such fees are not deducted from regulatory royalty calculations. ¶ AM-F-178. As a result, Services are being made to pay royalties on revenue that goes to the app stores and carriers and must bear the entire financial burden of participating in these distribution channels. ¶ AM-F-178. Rightsholders thus enjoy a disproportionate share of the rewards. ¶ AM-F-178.

**AM-C-44.** Under *Phonorecords II*, where a service earns revenue from advertising, then for purposes of calculating ‘Subpart C service revenue,’ “advertising . . . revenue shall be reduced by the actual cost of obtaining such revenue, not to exceed 15%.” 37 C.F.R. § 385.21 (definition “Subpart C service revenue” at (4)).<sup>5</sup> Similarly here, services and rightsholders should share in the costs, as well as the rewards, of obtaining revenues that are mediated and enabled by these third parties.

**AM-C-45.** Accordingly, the regulations should be revised to permit royalty calculations to be reduced by the amount of app store and carrier billing fees. ¶ AM-F-29.

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<sup>5</sup> App store and carrier fees are not analogous to “credit card commissions or similar payment process charges,” since the credit card companies do not directly make the music services available or accessible. See 37 C.F.R. § 385.21 (definition “Subpart C service revenue” at (2)(iii)). Rather—like “the actual cost of obtaining [advertising] revenue”—the fees at issue are directly incurred in order to obtain (not merely process) revenue for the streaming services.

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CONCLUSION

For the reasons set forth herein, the Judges should adopt Amazon's Proposed Rates and Terms.

May 11, 2017

Respectfully submitted,



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*Counsel for Amazon Digital Services LLC*





Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
Library of Congress  
Washington, D.C.

*In re*

**DETERMINATION OF ROYALTY  
RATES AND TERMS FOR MAKING AND  
DISTRIBUTING PHONORECORDS  
(Phonorecords III)**

**DOCKET NO. 16-CRB-0003-PR  
(2018-2022)**

**DECLARATION AND CERTIFICATION OF  
MICHAEL S. ELKIN REGARDING RESTRICTED MATERIALS**

**(On behalf of Amazon Digital Services LLC)**

1. I am counsel for Participant Amazon Digital Services LLC (“Amazon”) in the above-captioned matter. I respectfully submit this declaration pursuant to Rule 350.4(e)(1) of the Copyright Royalty Judges Rules and Procedures, 37 C.F.R. § 350.4(e)(1), and per the terms of the Protective Order issued July 27, 2016 (“Protective Order”). I am authorized by Amazon to submit this Declaration on Amazon’s behalf.

2. I have reviewed the Proposed Findings of Fact and Conclusions of Law (the “Submission”) and the attached Redaction Log. I am also familiar with the definitions and terms set forth in the Protective Order. Each of the redactions made in the Submission (as set forth on the attached Redaction Log) is necessitated by the designation of one of the participants in this proceeding as “Confidential Information” under the Protective Order. Because Amazon is bound under the Protective Order to treat as “Restricted” and to redact information designated “Confidential Information” by participants and other producing parties, they have done so. Amazon reserves all rights and arguments as to whether any such information is, in fact, “Confidential Information.”

3. Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: May 11, 2017  
New York, NY

/s/ Michael S. Elkin

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*Counsel for Amazon Digital Services LLC*



Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
Library of Congress  
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*In re*

**DETERMINATION OF ROYALTY  
RATES AND TERMS FOR MAKING  
AND DISTRIBUTING PHONORECORDS  
(Phonorecords III)**

**DOCKET NO. 16-CRB-0003-PR  
(2018-2022)**

**REDACTION LOG TO AMAZON DIGITAL SERVICES LLC'S  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Pursuant to the requirements of the Protective Order entered by the Judges on July 27, 2016, Amazon Digital Services LLC ("Amazon") hereby submits the following list of redactions from its Proposed Findings of Fact and Conclusions of Law filed May 11, 2017, and the undersigned certifies, in compliance with 37 C.F.R. § 350.4(e)(1) and based on the Declaration and Certification of Michael S. Elkin submitted herewith, that the listed redacted materials meet the definition of "Restricted" contained in the Protective Order.

Document	Page/Paragraph/Exhibit No.	General Description
Proposed Findings of Fact And Conclusions of Law	Page 7-8, ¶ AM-F-11	Contains material, non-public data about customer purchasing trends and preferences
	Page 9, ¶ AM-F-15	Contains material, non-public data about customer purchasing trends and preferences
	Page 10, ¶ AM-F-17	Contains material, non-public data about customer purchasing trends and preferences

	Page 11, ¶ AM-F-19	Contains material, non-public data about customer purchasing trends and preferences
	Page 12, ¶ AM-F-20	Contains material, non-public data about customer purchasing trends.
	Page 12, ¶ AM-F-21	Contains material, non-public data about customer purchasing trends.
	Page 13, ¶ AM-F-23	Contains material, non-public data about customer purchasing trends.
	Page 17, ¶ AM-F-33	Contains material, non-public information designated restricted by Spotify.
	Page 17, ¶ AM-F-34	Contains material, non-public information designated restricted by Google.
	Page 18, ¶ AM-F-38	Contains material, non-public expert findings related to survey results.
	Page 20, ¶ AM-F-45	Contains material, non-public financial data about digital downloads.
	Pages 20-21, Table	Contains material, non-public data about customer purchasing trends.
	Page 22, ¶ AM-F-46	Contains material, non-public financial data about digital downloads.
	Page 22, ¶ AM-F-50	Contains material, non-public expert findings related to survey results.

	Page 23, ¶ AM-F-51	Contains material, non-public expert findings related to survey results.
	Page 23, ¶ AM-F-53	Contains material, non-public expert findings related to survey results.
	Pages 30-31, ¶ AM-F-73	Contains material, non-public data about customer usage trends.
	Page 31, ¶ AM-F-74	Contains material, non-public data about customer usage trends.
	Page 31, ¶ AM-F-75	Contains material, non-public data about customer usage trends.
	Page 31, ¶ AM-F-76	Contains material, non-public data related to service offerings.
	Page 32, ¶ AM-F-77	Contains material, non-public expert findings related to survey results.
	Page 33, ¶ AM-F-80	Contains material, non-public data about customer usage trends.
	Page 33, ¶ AM-F-81	Contains material, non-public information related to license agreements.
	Page 33, ¶ AM-F-82	Contains material, non-public data about customer purchasing trends.
	Page 34, ¶ AM-F-83	Contains material, non-public data related to service offerings.

	Pages 34-35, ¶ AM-F-87	Contains material, non-public data about customer purchasing trends.
	Page 35, ¶ AM-F-88	Contains material, non-public data related to service offerings.
	Page 38, ¶ AM-F-96	Contains material, non-public subscriber data.
	Page 38, ¶ AM-F-97	Contains material, non-public subscriber and customer data.
	Pages 38-39, ¶ AM-F-98	Contains material, non-public sales information.
	Page 39, ¶ AM-F-99	Contains material, non-public subscriber data.
	Pages 39-40, ¶ AM-F-100	Contains material, non-public financial information related to royalty payments.
	Page 40, ¶ AM-F-101	Contains material, non-public financial information related to royalty payments.
	Page 40, ¶ AM-F-102	Contains material, non-public financial information related to royalty payments.
	Page 40, ¶ AM-F-103	Contains material, non-public financial information related to royalty payments.
	Page 40, ¶ AM-F-104	Contains material, non-public financial information related to royalty payments.
	Page 41, ¶ AM-F-105	Contains material, non-public financial information related to royalty payments.



	Page 41, ¶ AM-F-106	Contains material, non-public financial information related to royalty payments.
	Page 41, ¶ AM-F-107	Contains material, non-public financial information related to royalty payments.
	Page 42, ¶ AM-F-108	Contains material, non-public financial information related to royalty payments.
	Pages 44-45, ¶ AM-F-114	Contains material, non-public information related to license agreements.
	Page 46, ¶ AM-F-117	Contains material, non-public financial information related to royalty payments.
	Page 46, ¶ AM-F-118	Contains material, non-public financial information related to royalty payments.
	Pages 47-48, ¶ AM-F-120	Contains material, non-public financial information related to royalty payments.
	Page 47, fn. 3	Contains material, non-public financial information related to royalty payments.
	Page 48, ¶ AM-F-122	Contains material, non-public information designated restricted by the Copyright Owners.
	Page 51, ¶ AM-F-123	Contains material, non-public information designated restricted by the Copyright Owners.

	Page 51, ¶ AM-F-124	Contains material, non-public information designated restricted by the Copyright Owners.
	Page 51, ¶ AM-F-125	Contains material, non-public information designated restricted by the Copyright Owners.
	Page 51, ¶ AM-F-126	Contains material, non-public information designated restricted by the Copyright Owners.
	Page 52, ¶ AM-F-127	Contains material, non-public information designated restricted by the Copyright Owners.
	Pages 49-50, ¶ AM-F-128	Contains material, non-public information designated restricted by the Copyright Owners.
	Page 50, ¶ AM-F-129	Contains material, non-public information designated restricted by the Copyright Owners.
	Page 53, ¶ AM-F-137	Contains material, non-public subscriber data.
	Page 53, ¶ AM-F-138	Contains material, non-public subscriber and usage data.
	Page 53, ¶ AM-F-139	Contains material, non-public subscriber and usage data.
	Pages 53-54, ¶ AM-F-140	Contains material, non-public subscriber data.

	Page 58, ¶ AM-F-152	Contains material, non-public financial information related to Amazon's investments.
	Page 59, ¶ AM-F-154	Contains material, non-public financial information related to Amazon's investments.
	Page 74, ¶ AM-C-15	Contains material, non-public financial information related to royalty payments.
	Page 74, ¶ AM-C-17	Contains material, non-public information designated restricted by the Copyright Owners.



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Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
Library of Congress  
Washington, D.C.

*In re*

DETERMINATION OF ROYALTY  
RATES AND TERMS FOR MAKING  
AND DISTRIBUTING PHONORECORDS  
(Phonorecords III)

DOCKET NO. 16-CRB-0003-PR  
(2018-2022)

**AMAZON DIGITAL SERVICES LLC'S PROPOSED RATES AND TERMS**

Pursuant to 37 C.F.R. § 351.4(b)(3), Participant Amazon Digital Services LLC ("Amazon") proposes the following rates and terms for making and distributing phonorecords under the statutory license provided by 17 U.S.C. § 115 during the period January 1, 2018 through December 31, 2022:

**I. Proposed Rates**

Amazon proposes that any rates or terms not specifically addressed below shall roll-over as they are currently codified in the applicable regulations, including a rollover of the current rate for all service revenue categories that are currently set at 10.5%. Amazon takes no position as to rates governed by 37 C.F.R. § 385 Subpart A.

**II. Proposed Terms**

As discussed in the testimony of Rishi Mirchandani, Amazon proposes the following modifications to the current rates and terms set forth in 37 C.F.R. 385 Subparts B and C:

***Family Plans.*** The regulations should include language to make clear that the per subscriber minimum and/or subscriber-based royalty floor for family plans applies on an account level (and does not apply to each individual user associated with the family plan subscription). Because the regulations are not completely clear on this point, given market pricing, the per

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subscriber minimum and/or subscriber-based royalty floor for a family account should be equal to 150% of the per subscriber minimum and/or subscriber-based royalty floor for an individual account.

*Student Subscription Discounts.* The regulations should include a discount to the per subscriber minimum and subscriber-based royalty floor of 50%.

*Annual Subscription Discounts.* The regulations should include a discount to the per subscriber minimum and subscriber-based royalty floor of 16.67%.

*Royalty Deductions for App Store and Carrier Billing Fees.* The regulations should be revised to permit royalty calculations to be reduced by the amount of app store and carrier billing fees, with each capped at 15%.

Other than these proposed changes, which have been implemented and shown below in redline, Amazon proposes that the terms currently set forth in 37 C.F.R. § 385 be continued.

37 C.F.R. Part 385  
[PROPOSED CHANGES IN REDLINE]

SUBPART B—INTERACTIVE STREAMING AND LIMITED DOWNLOADS

§385.11 Definitions.

For purposes of this subpart, the following definitions shall apply:

Actual app store billing cost means the sum of amounts paid by the service provider to the applicable app store proprietor (or retained by such app store proprietor as the case may be) during the applicable month for providing an integrated billing system for a particular customer utilizing such applicable service integrated billing system to access a service during such month. The actual app store billing cost shall in no event be deemed to exceed 15% of the applicable service retail price.

...

Actual carrier billing cost means the sum of amounts paid by the service provider to the applicable wireless carrier (or retained by such wireless carrier as the case may be) during the applicable month for providing an integrated billing system for a particular customer utilizing such applicable service integrated billing system to access a service during such month. The actual carrier billing cost shall in no event be deemed to exceed 15% of the applicable service retail price.

...

Annual subscription means an individual or family account that purchases a 12 consecutive-month subscription through a service provider.

...

Family account means a subscription service account that provides access to licensed activity for up to six individuals, for a single price and marketed as a “family plan” subscription, where any particular individual may only be part of a single family account at any point in time. For avoidance of doubt, any reference to “subscriber” includes a family account as a single subscriber for purposes of computing the applicable royalty rate, regardless of category of licensing activity.

...

Individual account means a subscription service account that is associated with only one person and shall correlate with one customer account.

...

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*Service revenue.* (1) Subject to paragraphs (2) through (5) of the definition of “Service revenue,” and subject to GAAP, *service revenue* shall mean the following:

(i) All revenue recognized by the service provider from end users from the provision of licensed activity;

(ii) All revenue recognized by the service provider by way of sponsorship and commissions as a result of the inclusion of third-party “in-stream” or “in-download” advertising as part of licensed activity (*i.e.*, advertising placed immediately at the start, end or during the actual delivery, by way of interactive streaming or limited downloads, as applicable, of a musical work); and

(iii) All revenue recognized by the service provider, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a relevant page of the service or on any page that directly follows such relevant page leading up to and including the limited download or interactive streaming, as applicable, of a musical work; provided that, in the case where more than one service is actually available to end users from a relevant page, any advertising revenue shall be allocated between such services on the basis of the relative amounts of the page they occupy.

(2) In each of the cases identified in paragraph (1) of the definition of “Service revenue,” such revenue shall, for the avoidance of doubt,

(i) Include any such revenue recognized by the service provider, or if not recognized by the service provider, by any associate, affiliate, agent or representative of such service provider in lieu of its being recognized by the service provider;

(ii) Include the value of any barter or other nonmonetary consideration;

(iii) Not be reduced by credit card commissions or similar payment process charges; and

(iv) Except as expressly set forth in this subpart, not be subject to any other deduction or set-off other than the following: (1) refunds to end users for licensed activity that they were unable to use due to technical faults in the licensed activity or other bona fide refunds or credits issued to end users in the ordinary course of business; and (2) deductions for the transaction costs associated with app store cost or actual carrier billing cost, as defined in §385.11, that are derived from the licensed activity.

(3) In each of the cases identified in paragraph (1) of the definition of “Service revenue,” such revenue shall, for the avoidance of doubt, exclude revenue derived solely in connection with services and activities other than licensed activity, provided that advertising or sponsorship revenue shall be treated as provided in paragraphs (2) and (4) of the definition of “Service revenue.” By way of example, the following kinds of revenue shall be excluded:

(i) Revenue derived from non-music voice, content and text services;



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(ii) Revenue derived from other non-music products and services (including search services, sponsored searches and click-through commissions); and

(iii) Revenue derived from music or music-related products and services that are not or do not include licensed activity.

(4) For purposes of paragraph (1) of the definition of “Service revenue,” advertising or sponsorship revenue shall be reduced by the actual cost of obtaining such revenue, not to exceed 15%.

(5) Where the licensed activity is provided to end users as part of the same transaction with one or more other products or services that are not a music service engaged in licensed activity, then the revenue deemed to be recognized from end users for the service for the purpose of the definition in paragraph (1) of the definition of “Service revenue” shall be the revenue recognized from end users for the bundle less the standalone published price for end users for each of the other component(s) of the bundle; provided that, if there is no such standalone published price for a component of the bundle, then the average standalone published price for end users for the most closely comparable product or service in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used.

...

Student account means an individual subscription that meets at least the following criteria: the individual is enrolled in at least one course at a college geographically located in the United States.

...

**§385.13 Minimum royalty rates and subscriber-based royalty floors for specific types of services.**

(a) *In general.* The following minimum royalty rates and subscriber-based royalty floors shall apply to the following types of licensed activity:

(1) *Standalone non-portable subscription—streaming only.* Except as provided in paragraph

(a)(4) of this section, in the case of a subscription service through which an end user can listen to sound recordings only in the form of interactive streams and only from a non-portable device to which such streams are originally transmitted while the device has a live network connection, the minimum for use in step 1 of §385.12(b)(1)(ii) is the lesser of subminimum II as described in paragraph (c) of this section for the accounting period and the aggregate amount of 50 cents per subscriber individual account per month and 75 cents per family account per month. The

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subscriber-based royalty floor for use in step 3 of §385.12(b)(3)(ii) is the aggregate amount of 15 cents per subscriber individual account per month and 22.5 cents per family account per month.

(2) *Standalone non-portable subscription—mixed.* Except as provided in paragraph (a)(4) of this section, in the case of a subscription service through which an end user can listen to sound recordings either in the form of interactive streams or limited downloads but only from a non-portable device to which such streams or downloads are originally transmitted, the minimum for use in step 1 of §385.12(b)(1)(ii) is the lesser of the subminimum I as described in paragraph (b) of this section for the accounting period and the aggregate amount of 50 cents per subscriber individual account per month and 75 cents per family account per month. The subscriber-based royalty floor for use in step 3 of §385.12(b)(3)(ii) is the aggregate amount of 30 cents per subscriber individual account per month and 45 cents per family account per month.

(3) *Standalone portable subscription service.* Except as provided in paragraph (a)(4) of this section, in the case of a subscription service through which an end user can listen to sound recordings in the form of interactive streams or limited downloads from a portable device, the minimum for use in step 1 of §385.12(b)(1)(ii) is the lesser of subminimum I as described in paragraph (b) of this section for the accounting period and the aggregate amount of 80 cents per subscriber individual account per month and \$1.20 per family account per month. The subscriber-based royalty floor for use in step 3 of §385.12(b)(3)(ii) is the aggregate amount of 50 cents per subscriber individual account per month and 75 cents per family account per month.

(4) *Bundled subscription services.* In the case of a subscription service providing licensed activity that is made available to end users with one or more other products or services (including products or services subject to other subparts) as part of a single transaction without pricing for the subscription service providing licensed activity separate from the product(s) or service(s) with which it is made available (e.g., a case in which a user can buy a portable device and one-year access to a subscription service providing licensed activity for a single price), the minimum for use in step 1 of §385.12(b)(1)(ii) is subminimum I as described in paragraph (b) of this section for the accounting period. The subscriber-based royalty floor for use in step 3 of §385.12(b)(3)(ii) is the aggregate amount of 25 cents per month for each end user who has made at least one play of a licensed work during such month (each such end user to be considered an “active subscriber”).

(5) *Free nonsubscription/ad-supported services.* In the case of a service offering licensed activity free of any charge to the end user, the minimum for use in step 1 of §385.12(b)(1)(ii) is subminimum II described in paragraph (c) of this section for the accounting period. There is no subscriber-based royalty floor for use in step 3 of §385.12(b)(3)(ii).

...

(e) *Computation of subscriber-based royalty rates.* For purposes of paragraph (a) of this section, to determine the minimum or subscriber-based royalty floor, as applicable to any particular

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offering, the total number of subscriber-months for the accounting period, shall be calculated taking into account all end users who were subscribers for complete calendar months, prorating in the case of end users who were subscribers for only part of a calendar month, and deducting on a prorated basis for end users covered by a free trial period subject to the promotional royalty rate as described in §385.14(b)(2), except that in the case of a bundled subscription service, subscriber-months shall instead be determined with respect to active subscribers as defined in paragraph (a)(4) of this section. The product of the total number of subscriber-months for the accounting period and the specified number of cents per subscriber (whether an individual account, family account, or active subscriber, as the case may be) shall be used as the subscriber-based component of the minimum or subscriber-based royalty floor, as applicable, for the accounting period.

**§385.15 ~~{Reserved}~~-Discounts**

(a) In general. In calculating the royalty payments for licensed activity in §385.12, the following discounts may be taken from the minimum royalty rates and subscriber-based royalty floors as set forth in §385.13:

(1) Student subscription discount. For each qualified student account, as defined in §385.11, a service provider may discount the minimum royalty rate(s) and subscriber-based royalty floor(s) as set forth in §385.13 by 50%.

(2) Annual subscription discounts. For each qualifying annual subscription, as defined in §385.11, a service provider may discount the minimum royalty rate(s) and subscriber-based royalty floor(s) as set forth in §385.13 by 16.67%.

(3) App store and carrier billing. A service provider may discount the minimum royalty rate(s) and subscriber-based royalty floor(s) as set forth in §385.13 commensurate with its actual app store and carrier billing costs as defined in §385.11, not to exceed 15% for each.

...

**SUBPART C—LIMITED OFFERINGS, MIXED SERVICE BUNDLES, MUSIC BUNDLES, PAID LOCKER SERVICES AND PURCHASED CONTENT LOCKER SERVICES**

**§385.21 Definitions.**

For purposes of this subpart, the following definitions shall apply:

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Actual app store billing cost means the sum of amounts paid by the service provider to the applicable app store proprietor (or retained by such app store proprietor as the case may be) during the applicable month for providing an integrated billing system for a particular customer utilizing such applicable service integrated billing system to access a service during such month. The actual app store billing cost for any particular customer shall in no event be deemed to exceed 15% of the applicable service retail price.

...

Actual carrier billing cost means the sum of amounts paid by the service provider to the applicable wireless carrier (or retained by such wireless carrier as the case may be) during the applicable month for providing an integrated billing system for a particular customer utilizing such applicable service integrated billing system to access a service during such month. The actual carrier billing cost for any particular customer shall in no event be deemed to exceed 15% of the applicable service retail price.

...

Family account means a subscription service account that provides access to licensed activity for up to six individuals, for a single price and marketed as a "family plan" subscription, where any particular individual may only be part of a single family account at any point in time. For avoidance of doubt, any reference to "subscriber" includes a family account as a single subscriber for purposes of computing the applicable royalty rate, regardless of category of licensing activity.

...

Individual account means a subscription service account that is associated with only one person and shall correlate with one customer account.

...

*Subpart C service revenue.* (1) Subject to paragraphs (2) through (6) of the definition of "Subpart C service revenue," as defined in this section, and subject to GAAP, subpart C service revenue shall mean, referring to subpart C of this part, the following:

- (i) All revenue recognized by the service provider from end users from the provision of licensed subpart C activity, as defined in this section;
- (ii) All revenue recognized by the service provider by way of sponsorship and commissions as a result of the inclusion of third-party "in-stream" or "in-download" advertising as part of licensed subpart C activity, as defined in this section, (i.e., advertising placed immediately at the start, end or during the actual delivery, by way of transmissions of a musical work that constitute licensed subpart C activity, as defined in this section); and

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(iii) All revenue recognized by the service provider, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a subpart C relevant page, as defined in this section, of the service or on any page that directly follows such subpart C relevant page, as defined in this section, leading up to and including the transmission of a musical work that constitutes licensed subpart C activity, as defined in this section; provided that, in the case where more than one service is actually available to end users from a subpart C relevant page, as defined in this section, any advertising revenue shall be allocated between such services on the basis of the relative amounts of the page they occupy.

(2) In each of the cases identified in paragraph (1) of the definition of "Subpart C service revenue," of this section such revenue shall, for the avoidance of doubt,

(i) Include any such revenue recognized by the service provider, or if not recognized by the service provider, by any associate, affiliate, agent or representative of such service provider in lieu of its being recognized by the service provider;

(ii) Include the value of any barter or other nonmonetary consideration;

(iii) Not be reduced by credit card commissions or similar payment process charges; and

(iv) Except as expressly set forth in this subpart, not be subject to any other deduction or set-off other than the following: (1) refunds to end users for licensed subpart C activity, as defined in this section, that they were unable to use due to technical faults in the licensed subpart C activity, as defined in this section, or other bona fide refunds or credits issued to end users in the ordinary course of business and (2) deductions for the transaction costs associated with actual app store cost or actual carrier billing cost, as defined in §385.21, that are derived from the licensed subpart C activity, as defined in this section.

(3) In each of the cases identified in paragraph (1) of the definition of "Subpart C service revenue" of this section, such revenue shall, for the avoidance of doubt, exclude revenue derived solely in connection with services and activities other than licensed subpart C activity, as defined in this section, provided that advertising or sponsorship revenue shall be treated as provided in paragraphs (2) and (4) of the definition of "Subpart C service revenue" of this section. By way of example, the following kinds of revenue shall be excluded:

(i) Revenue derived from non-music voice, content and text services;

(ii) Revenue derived from other non-music products and services (including search services, sponsored searches and click-through commissions);

(iii) Revenue generated from the sale of actual locker service storage space to the extent that such storage space is sold at a separate retail price;

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(iv) In the case of a locker service, revenue derived from the sale of permanent digital downloads or ringtones; and

(v) Revenue derived from other music or music-related products and services that are not or do not include licensed subpart C activity, as defined in this section.

(4) For purposes of paragraph (1) of the definition of "Subpart C service revenue" of this section, advertising or sponsorship revenue shall be reduced by the actual cost of obtaining such revenue, not to exceed 15%.

(5) In the case of a mixed service bundle, the revenue deemed to be recognized from end users for the service for the purpose of the definition in paragraph (1) of the definition of "Subpart C service revenue" of this section shall be the greater of—

(i) The revenue recognized from end users for the mixed service bundle less the standalone published price for end users for each of the non-music product or non-music service components of the bundle; provided that, if there is no such standalone published price for a non-music component of the bundle, then the average standalone published price for end users for the most closely comparable non-music product or non-music service in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used; and

(ii) Either—

(A) In the case of a mixed service bundle that either has 750,000 subscribers or other registered users, or is reasonably expected to have 750,000 subscribers or other registered users within 1 year after commencement of the mixed service bundle, 40% of the standalone published price of the licensed music component of the bundle (i.e., the permanent digital downloads, ringtones, locker service or limited offering); provided that, if there is no such standalone published price for the licensed music component of the bundle, then the average standalone published price for end users for the most closely comparable licensed music component in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used; and further provided that in any case in which royalties were paid based on this paragraph due to a reasonable expectation of reaching 750,000 subscribers or other registered users within 1 year after commencement of the mixed service bundle and that does not actually happen, applicable payments shall, in the accounting period next following the end of such 1-year period, retroactively be adjusted as if paragraph (5)(ii)(B) of the definition of "Subpart C service revenue" of this section applied; or

(B) Otherwise, 50% of the standalone published price of the licensed music component of the bundle (i.e., the permanent digital downloads, ringtones, locker service or limited offering); provided that, if there is no such standalone published price for the licensed music component of the bundle, then the average standalone published price for end users for the most closely

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comparable licensed music component in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used.

(6) In the case of a music bundle containing a physical phonorecord, where the music bundle is distributed by a record company for resale and the record company is the compulsory licensee—

(i) Service revenue shall be 150% of the record company's wholesale revenue from the music bundle; and

(ii) The times at which distribution and revenue recognition are deemed to occur shall be in accordance with §201.19 of this title.

...

Student account means an individual subscription that meets at least the following criteria: the individual is enrolled in at least one course at a college geographically located in the United States.

**§385.23 Royalty rates and subscriber-based royalty floors for specific types of services.**

(a) *In general.* The following royalty rates and subscriber-based royalty floors shall apply to the following types of licensed subpart C activity, as defined in §385.21:

(1) *Mixed service bundle.* In the case of a mixed service bundle, the percentage of subpart C service revenue, as defined in §385.21, applicable in step 1 of §385.22(b)(1)(i) is 11.35%. The minimum for use in step 1 of §385.22(b)(1)(ii) is the appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to §385.23(b)(1) is 17.36%, and the sound recording-only percentage applicable to §385.23(b)(2) is 21%.

(2) *Music bundle.* In the case of a music bundle, the percentage of subpart C service revenue, as defined in §385.21, applicable in step 1 of §385.22(b)(1)(i) is 11.35%. The minimum for use in step 1 of §385.22(b)(1)(ii) is the appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to §385.23(b)(1) and (3) is 17.36%, and the sound recording-only percentage applicable to §385.23(b)(2) is 21%.

(3) *Limited offering.* In the case of a limited offering, the percentage of subpart C service revenue, as defined in §385.21, applicable in step 1 of §385.22(b)(1)(i) is 10.5%. The minimum for use in step 1 of §385.22(b)(1)(ii) is the greater of—

(i) The appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to §385.23(b)(1) is 17.36%, and the sound recording-only percentage applicable to §385.23(b)(2) is 21%; and

(ii) The aggregate amount of 18 cents per subscriber individual account per month and 27 cents per family account per month.

(4) *Paid locker service.* In the case of a paid locker service, the percentage of subpart C service revenue, as defined in §385.21, applicable in step 1 of §385.22(b)(1)(i) is 12%. The minimum for use in step 1 of §385.22(b)(1)(ii) is the greater of—

(i) The appropriate subminimum as described in paragraph (b) of this section for the accounting period, where the all-in percentage applicable to §385.23(b)(1) is 17.11%, and the sound recording-only percentage applicable to §385.23(b)(2) is 20.65%; and

(ii) The aggregate amount of 17 cents per subscriber individual account per month and 25.5 cents per family account per month.

...

(c) *Computation of subscriber-based royalty rates.* For purposes of paragraphs (a)(3) and (4) of this section, to determine the subscriber-based minimum applicable to any particular subpart C offering, as defined in §385.21, the total number of subscriber-months for the accounting period shall be calculated, taking into account all end users who were subscribers (whether an individual account or family account) for complete calendar months, prorating in the case of end users who were subscribers for only part of a calendar month, and deducting on a prorated basis for end users covered by a free trial period subject to the free trial royalty rate as described in §385.24. The product of the total number of subscriber-months for the accounting period and the specified number of cents per subscriber shall be used as the subscriber-based component of the minimum for the accounting period.

...

#### **§385.25 Discounts**

(a) *In general.* In calculating the royalty payments for licensed activity in §385.22, the following discounts may be taken from the minimum royalty rates and subscriber-based royalty floors as set forth in §385.23:

(1) *Student subscription discount.* For each qualified student account, as defined in §385.21, a service provider may discount the minimum royalty rate(s) and subscriber-based royalty floor(s) as set forth in §385.23 by 50%.

(2) *Annual subscription discounts.* For each qualifying annual subscription, as defined in §385.21, a service provider may discount the minimum royalty rate(s) and subscriber-based royalty floor(s) as set forth in §385.23 by 16.67%.



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(3) App store and carrier billing. A service provider may discount the minimum royalty rate(s) and subscriber-based royalty floor(s) as set forth in §385.23 commensurate with its actual app store and carrier billing costs as defined in §385.21, not to exceed 15% for each.



## CERTIFICATE OF SERVICE

I, Eric J. Anderson, do hereby certify that a copy of the foregoing Proposed Findings of Fact and Conclusions of Law, and Proposed Section 115 Rates and Terms (PUBLIC Version) has been served on the 12th day of May, 2017

Via electronic mail:

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A handwritten signature in black ink, appearing to read "Eric J. Anderson", with a long horizontal flourish extending to the right.

Eric J. Anderson